Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA; BASIN ELECTRIC POWER COOPERATIVE, INC.; AND WESTERN FUELS ASSOCIATION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 49 U.S.C. § 11701(c), an investigative proceeding "is dismissed automatically unless it is concluded by the [Surface Transportation] Board" within three years. In this case, shippers challenged BNSF's coal-transport rates. The Board initially found—prior to expiration of § 11701(c)'s three-year deadline—that the shippers had failed to prove BNSF's rates unreasonable. But the Board gave the shippers a second chance to make their case. Over BNSF's objection that the continued proceedings had impermissibly extended beyond § 11701(c)'s three-year deadline, the Board considered the shippers' new case, found the challenged rates unreasonable, and ordered more than $300 million in rate relief—by far the largest award ever entered by the STB. On appeal, BNSF argued (inter alia) that the Board's later order was contrary to law under § 11701(c). The D.C. Circuit refused to address that substantial challenge, even though it had been raised timely under the Board's own rules and the Board had rejected the argument on the merits. The questions presented are:

1. Whether the D.C. Circuit erred by holding that petitioner's argument challenging agency action was forfeited before the agency, when the agency had resolved the argument on its merits without ever suggesting that the argument had not been properly raised. The D.C. Circuit has joined the Fifth and Eighth Circuits by finding an administrative forfeiture in these circumstances, in square conflict with decisions of the Third, Seventh, Ninth, Tenth, and Federal Circuits.

2. Whether the D.C. Circuit erred in imposing, ex post, its own judicially-created rule of administrative forfeiture not grounded in any statute, rule, or agency practice, in conflict with this Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

RULE 29.6 STATEMENT

BNSF Railway Company ("BNSF"), a common carrier by railroad, is a wholly-owned subsidiary of its parent, Burlington Northern Santa Fe, LLC ("BNSF LLC"). BNSF LLC is an indirect, wholly owned subsidiary of Berkshire Hathaway Inc., a publicly-held corporation.

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The opinion of the court of appeals is reported at 604 F.3d 602 (App.1a-22a).

JURISDICTION

The D.C. Circuit denied BNSF's motion for rehearing and rehearing en banc on September 2, 2010. App.57a-60a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The text of 49 U.S.C. § 11701 and 49 C.F.R. § 1111.5 are reproduced at App.61a-62a.

STATEMENT OF THE CASE

The D.C. Circuit dismissed BNSF's principal challenge to the largest reparations order ever entered by the Surface Transportation Board ("Board" or "STB") as untimely raised before the Board, even though (i) BNSF had raised the argument well before the Board's final decision, and the only applicable STB rule provides that a motion to dismiss may be made "*anytime* during a proceeding," 49 C.F.R. § 1111.5 (emphasis added); (ii) the Board had rejected the argument on the merits without any suggestion—by the Board or the complainant shippers ("WFA")—that it was untimely, and (iii) neither the Board nor WFA argued that the argument was untimely in their briefs to the court of appeals. That holding is fundamentally misguided in at least two respects, deepens a well-recognized and mature circuit split, and warrants this Court's review.

First, by holding BNSF's challenge forfeited even though the Board addressed the argument on the merits without questioning its timeliness, the D.C. Circuit's decision conflicts squarely with prior decisions of this Court recognizing that a court may not affirm agency action on a basis other than that invoked by the agency itself, *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), and the corollary that a court must defer to an agency's waiver of its own rules of procedure, *see, e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975); *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970). Despite this Court's clear admonition, however, the circuits are now deeply divided: three circuits, including the influential D.C. Circuit, will entertain non-statutory administrative forfeiture arguments not relied upon by the agency; at least five other circuits have properly concluded that they may not.

Second, even if it were appropriate for a federal court to *sua sponte* consider a supposed procedural bar to an argument resolved by the agency on its merits, the D.C. Circuit's forfeiture holding would still be fundamentally flawed. By holding BNSF's challenge forfeited based on nothing more than the court's own subjective sense of administrative timeliness—not tied to any statute, rule, or agency practice—the decision assumes for the judiciary the very common-law-making power that this Court flatly repudiated in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978), and reintroduces a harmful uncertainty and confusion about the operation of fundamental principles of administrative law that had been settled for decades. The D.C. Circuit, with its disproportionate jurisdiction over agency action, has adopted an approach to

administrative forfeiture that threatens to fundamentally disrupt the balance Congress has struck between an agency's authority to fashion and implement its own rules of procedure and the limited role of a reviewing court.

This is an appropriate vehicle through which to resolve the questions presented. The court's holding barred petitioner's primary challenge to an unprecedented Board order imposing what the Board itself estimated to be more than $300 million in reparations and future rate relief. And the underlying statutory question that the D.C. Circuit avoided—whether 49 U.S.C. § 11701's three-year automatic dismissal provision applies to complaint proceedings such as these—is an important one in its own right. The Board's interpretation of that statutory command is contrary to both its plain text and the legislative history, and undermines Congress's policy decision to grant carriers repose as to the lawfulness of their rates if a complaint is not resolved within three years. That substantial question was left unresolved by the D.C. Circuit based on a fundamentally misguided forfeiture holding that deepens a mature and apparently intractable circuit split. The petition for certiorari should be granted.

Statutory Background

The Board succeeded the Interstate Commerce Commission ("ICC") as the federal agency charged by Congress with economic regulation of the freight railroad industry. The Board's regulatory jurisdiction over railroad rates, however, is quite limited. It may initiate an administrative proceeding to review rates charged by a railroad *only* if the railroad has "market dominance." *See* 49 U.S.C. §§ 10701(d)(1), 10704(a)-(b),

10707(b). If the Board determines that it has jurisdiction over the challenged rate, it must decide whether the rate is "reasonable." *Id.* § 10701(d)(1). If the Board finds the rate unreasonable, it "may prescribe" the maximum rate the railroad may charge going forward and may order reparations to compensate the complaining shipper for overcharges. *Id.* §§ 10704(a)(1), 11704(b).

Board investigations are subject to a statutory three-year time limit. *Id.* § 11701(c). In particular, § 11701(a) states that, except as otherwise provided, "the Board may begin an investigation under this part only on complaint," and § 11701(c) states that an investigative proceeding brought under subsection (a) "is dismissed automatically unless it is concluded by the Board ... by the end of the third year" after it was begun.

Relevant Facts and Proceedings Below

From 1984 to 2004, BNSF transported WFA's coal from the Powder River Basin ("PRB") in Wyoming to WFA's electric generating facility at Moba Junction, Wyoming, under a long-term contract. Under that contract, the transportation rate gradually decreased from $4 per ton in 1984 to $3 per ton in 2004. *See* App.24a. When the parties' efforts to negotiate a replacement contract were unsuccessful, BNSF established a common carrier rate of $6 per ton, which was "one of the lowest transportation rates any utility pays to acquire PRB coal," and "low on a dollar-per-ton basis" in comparison to rates paid by other utilities in the region. *Id.*

WFA nonetheless filed a complaint with the Board on October 19, 2004, asserting that the rate was unreasonable. *See* App.27a-28a. Even though "railroad

costs increased approximately 60% and demand for PRB coal production increased by 500%" during the life of WFA's contract with BNSF, WFA contended that its rate should be only $3.10—nearly 25% less than the initial contract rate negotiated in 1984. App.24a-25a. WFA sought over $20 million per year in rate relief through 2024. App.25a.

The parties completed their briefing to the Board in December 2005. In October 2006, the Board issued final rules in a separate rulemaking proceeding that modified the guideline that it applies to determine the reasonableness of coal-transport rates and directed that the new rules would be applied to pending cases, including WFA's case. The Board explained that applying the new rules to this case was not unfair because it would not upset "settled expectations." JA251.[1] Though WFA (unsuccessfully) challenged the application of the new rules to its case, *see BNSF Ry. Co. v. STB*, 526 F.3d 770, 784 (D.C. Cir. 2008) ("*Major Issues*"), it never asked the Board for the opportunity to modify its evidence or arguments in light of the new rules.

On September 7, 2007, forty-two days shy of §11701(c)'s three-year deadline, the Board issued a decision finding that WFA had failed to prove that BNSF's rates were unreasonable. *See* App.23a-31a ("*2007 Decision*"). However, despite its prior finding that it could fairly apply its new rules to this proceeding, the Board reversed course and offered WFA the opportunity to reopen the record and present

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[1] "JA---" refers to the Joint Appendix filed with the D.C. Circuit.

a revised case tailored to the new rules. App.25a-27a.[2] WFA accepted that offer on October 22, 2007, a few days after the three-year deadline had passed.[3] On July 14, 2008, in its first substantive brief in response to WFA's revised case, BNSF argued that the proceeding should be dismissed for extending beyond the statutory time limit provided in § 11701(c). JA512, 533-34. In reply, WFA did not suggest that any Board rule or precedent rendered BNSF's argument for dismissal untimely, but argued that it was wrong on the merits and that "equitable considerations" should prevent BNSF from prevailing on it in any event. JA578.

On February 18, 2009, the Board issued a new decision, this time finding BNSF's challenged rates unreasonably high and ordering more than $300 million in estimated rate relief. *See* App.32a-36a ("*2009 Decision*").[4] The Board rejected BNSF's argument for dismissal under § 11701 on the merits, citing Board precedent holding that (notwithstanding its plain text)

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[2] In its petition for reconsideration of the *2007 Decision*, filed October 22, 2007, BNSF pointed out that permitting the proceedings to continue would undermine the statutory scheme that is intended to "give railroads repose if cases are not determined within three years." JA452 (citing § 11701(c)).

[3] The D.C. Circuit's opinion twice states, incorrectly, that the parties agreed to a schedule that "would include time for additional discovery." App.9a, 16a. Although it should not matter either way, the parties actually agreed to a procedural schedule "that would *not* include time for additional discovery." JA478 (emphasis added).

[4] Even so, the Board acknowledged that "the challenged rates are among the lowest transportation rates any utility pays to receive PRB coal," and "appeared on their face to be commercially reasonable." App.33a.

"the 3-year timetable in [§ 11701(c)] does not apply to rate cases begun on complaint" and "applies only in those circumstances where the Board institutes a proceeding on its own initiative." App.36a. The Board did not suggest that BNSF's three-year statutory argument was untimely under Board rules or precedent.

In its petition for review of the Board's order, BNSF once again argued that § 11701(c)'s three-year limit applies to this case. Final Brief of Petitioner ("Pet'r D.C. Cir. Br.") 26-42, ECF No. 1222535. BNSF pointed out that the Board's interpretation of § 11701(c) as excluding all proceedings brought "on complaint" is textually untenable. Pet'r D.C. Cir. Br. 28-29. Subsection (c)'s three-year time limitation applies only to "formal investigative proceeding[s] begun by the Board *under subsection (a)*." 49 U.S.C. § 11701(c) (emphasis added). Subsection (a), in turn, authorizes the Board to initiate only one type of proceeding: those brought "on complaint." *Id.* § 11701(a). The statute, BNSF explained, is not susceptible to the Board's reading—which excludes from subsection (c)'s scope the *only* type of proceeding actually mentioned in subsection (a). And the statutory history confirms this conclusion. Pet'r D.C. Cir. Br. 29-32.

Moreover, BNSF explained that—contrary to the Board's suggestion—enforcement of § 11701(c)'s unambiguous command in this case would not offend due process. Pet'r D.C. Cir. Br. 33-42. The Board was not required to provide WFA a second bite at the apple after the Board found in September 2007 that WFA failed to prove BNSF's rates unreasonable, because the Board had given WFA ample notice and opportunity to

request leave to file evidence bearing on the new standard when the Board informed WFA in February 2006 that the new rules would apply to its case. *See Major Issues*, 526 F.3d at 784.

BNSF argued that the Board's proceedings therefore terminated automatically as of October 19, 2007—three years after WFA filed its complaint—with no finding that BNSF's rates are unreasonable and no order of reparations. At the same time, BNSF acknowledged that, if the Board's September 2007 decision were treated as a final decision, then the later proceedings could be construed as a reopening, restarting the three-year statutory clock and preserving the possibility of *prospective* relief for the shippers. Pet'r D.C. Cir. Br. 43-44.

The Board and WFA's briefs responded to BNSF's dismissal argument at length on the merits, but nowhere suggested that BNSF had forfeited the argument by raising it too late before the Board. *See, e.g.*, Joint Brief of Respondents STB and United States 28-48, ECF No. 1222549; Joint Brief of Intervenors 23-28, ECF No. 1222245. Although the Board had thus never questioned the timeliness of BNSF's statutory three-year argument—during the administrative proceedings, in its final decision, or in its brief in the court of appeals—the court *sua sponte* raised a timeliness concern a few days before the oral argument. The court ordered the parties to address at oral argument whether BNSF forfeited its statutory dismissal argument and whether the Board in turn "forfeited its right to rely on such forfeiture (if any) by failing to argue the issue on appeal." App.55a. At oral argument, BNSF explained that it raised its argument timely before the Board and that, in any event, the

Board twice forfeited any timeliness objection—first through its "consideration of the issue on the merits" and its "failure to raise untimeliness" below, and again by declining to raise it on appeal. App.63a-66a (citing, *e.g.*, *Chenery* and *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001)).

The court ultimately granted BNSF's petition for review in part so that the Board could address on remand one of BNSF's objections to the Board's application of its rate reasonableness guidelines. But it declined to reach BNSF's statutory dismissal argument, holding that BNSF had forfeited that argument by failing to raise it sooner before the Board. The court so held even though BNSF had raised the argument within the time contemplated by the Board's rules, the Board had addressed the argument on its merits, and neither the Board nor WFA had argued—before the Board or in their briefs on appeal—that BNSF's challenge was untimely.

Although the court of appeals recited this Court's instruction in *United States v. L.A. Tucker Truck Lines, Inc.*, 34 U.S. 33, 37 (1952), that reviewing courts should refrain from considering arguments that were not raised before the administrative agency "'at the time appropriate *under [the agency's] practice*,'" App. 15a (emphasis added), it did not even pretend to rely on the Board's "practice" for its forfeiture holding. The court acknowledged that, under Board rules, BNSF was allowed to "fil[e] a motion to dismiss at any point in the WFA proceeding, *see* 49 C.F.R. § 1111.5," App.16a, but nonetheless ruled that BNSF had "stood silent before the Board" for too long, App.16a-17a. The court concluded that "BNSF did not timely present the three-year limit argument to the Board," even though

BNSF had raised the argument in its first substantive filing in response to WFA's revised case, once the three-year limitations period had actually run. App.17a.[5] And the court concluded that it could *sua sponte* reject BNSF's challenge as untimely—*i,e.*, that the Board had not forfeited the forfeiture—because the Board had ruled against BNSF on the merits. *See id.* ("The Board never acquiesced in BNSF's view that section 11701(c)'s three-year limit applied to complaint-initiated investigations and rejected BNSF's argument on the merits when it was first raised in July 2008.").

BNSF filed a petition for panel or en banc rehearing, arguing that the court erred in affirming the Board's action on a ground not relied on by the Board and by imposing its own rule of administrative forfeiture upon the Board's proceedings. The court of appeals denied rehearing on September 2, 2010. App.57a-58a.

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[5] *BNSF Railway Co. v. STB*, 453 F.3d 473, 479 (D.C. Cir. 2006) ("*Xcel*"), cited by the panel, does not address the questions presented here. In *Xcel*, the three-year statutory argument was raised for the first time in a footnote in a petition for reconsideration of a final Board decision, and the Board consequently *did not* address it on the merits. On appeal, the Board argued that it had not been timely raised. The D.C. Circuit agreed, reasoning that the Board was *prohibited by statute* and Board precedent from addressing the argument because it was first raised on reconsideration *after* a final Board decision. *Id.* at 479 (explaining that "the criteria for granting reconsideration are *limited by statute*" and the "*Board* 'generally does not consider new issues raised for the first time on reconsideration'") (emphases added) (citation omitted). Thus, in *Xcel*, unlike here, the court plainly did not impose its *own* preferred timeliness procedures. It simply affirmed the Board's determination that the argument had not been timely raised.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's decision has deepened a recognized and entrenched circuit split concerning an important and recurring question of law: whether a federal court may refuse to consider a party's argument challenging agency action based on an administrative forfeiture, when the agency itself did not find forfeiture and ruled on the merits of the argument. At least five circuits have concluded that they may not, and others have indicated that they share that view. Those courts have sensibly applied this Court's admonition in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), that agency action must be affirmed, if at all, on a basis proffered by the agency. Those circuits also recognize the inherent unfairness of requiring litigants to "suddenly ... defend [in federal court] a claim of untimeliness never before raised." *Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir. 2001). The D.C. Circuit and two other circuits disagree. In those circuits, an agency may spring an administrative forfeiture argument upon the parties for the first time on appeal or—as in this case—a federal court may avoid a substantial statutory challenge to agency action based on a forfeiture argument not relied upon by the agency.

The D.C. Circuit compounded its error in this case by fashioning and applying its own, apparently subjective, rule of administrative forfeiture, not grounded in statute, rule, or agency practice, in square conflict with this Court's decision in *Vermont Yankee*, thereby creating uncertainty in an area of administrative law that had been settled for decades.

The decision below fundamentally misapprehends the respective roles of courts and administrative

agencies by purporting to affirm the Board's action on a rationale not proffered by the Board and by usurping the agency's prerogative to fashion its own procedures and decide whether and to what extent to waive them. These are issues of national importance, over which the D.C. Circuit wields disproportionate influence. This Court should grant certiorari to resolve the circuit conflict and restore clarity to these once-settled rules of administrative law.

I. THE D.C. CIRCUIT'S AFFIRMANCE OF AGENCY ACTION ON NON-STATUTORY PROCEDURAL GROUNDS NOT RELIED UPON BY THE AGENCY DEEPENS A WELL-RECOGNIZED AND MATURE CIRCUIT SPLIT

Under *Chenery* and its progeny, this Court has long adhered to the "simple but fundamental rule of administrative law" that a court is "*powerless* to affirm ... administrative action by substituting what it considers to be a more adequate or proper basis." 332 U.S. at 196 (emphasis added); *see also ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (courts "*may not* affirm on a basis containing any element of discretion ... that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[W]e *may not* supply a reasoned basis for the agency's action that the agency itself has not given.") (emphasis added). Thus, "an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962)).

For the same reason, the courts "*may not* accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines*, 371 U.S. at 168 (emphasis added).[6]

This Court has recognized that the admonition of *Chenery* applies with equal force whether the alternative rationale is substantive or procedural; it is the province of the administrative agency not only to fashion rules of procedure, but also to decide whether and to what extent to waive them. *See Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975); *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970) (ICC may "relax or modify" its own procedures).

Nevertheless, a pronounced circuit split has developed as to whether a reviewing court may avoid addressing a party's argument on the merits by affirming the agency's decision on (non-statutory) procedural grounds not relied upon by the agency.[7] By

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[6] *See also Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 297 (1945) ("If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it.").

[7] Of course, a court may (indeed, *must*) determine that it has statutory jurisdiction to entertain a challenge to agency action even if the agency overlooks a potential jurisdictional defect. *See, e.g.*, 16 U.S.C. § 825*l*(a)-(b) (requiring litigant to file rehearing petition before challenging FERC decision in federal court); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) ("Neither FERC nor this court has authority to waive these statutory requirements."); *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007) (party waived argument "by failing to present it to FERC as required by [the FPA]"). There is no such defect here.

answering that question in the affirmative, the D.C. Circuit joins the Fifth and Eighth Circuits in an entrenched conflict with the Third, Seventh, Ninth, Tenth, and Federal Circuits.[8] The lower courts and at least one commentator have acknowledged this conflict. *See, e.g.*, *Ester*, 250 F.3d at 1071 (Flaum, C.J., and Easterbrook and Williams, JJ.) ("[T]he courts of appeals that have considered the issue have not produced uniform results."); *Eneje v. Keisler*, 251 F. App'x 154, 154 n.* (4th Cir. 2007) (recognizing split); *Lewis v. Leavitt*, No. 1:07CV375, 2008 U.S. Dist. LEXIS 61502, at *11 (M.D.N.C. Aug. 8, 2008) (same); *Smith v. Danzig*, Civil No. 00-216-P-H, 2001 U.S. Dist. LEXIS 10262, at *33 (D. Me. July 20, 2001) (same); Kevin J. Dolley, Comment, *Administrative Waiver of the Untimeliness Defense in Title VII Cases Concerning Federal Employees: A Proposed Analysis*, 46 St. Louis U. L.J. 477, 489 (2002) (describing circuit split on whether appellate court may find administrative forfeiture "[w]hen an agency provides a final decision on the merits and there is no mention of untimely exhaustion of administrative remedies") (footnote omitted).

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[8] Prior D.C. Circuit decisions were murky on this question. *See* Kevin J. Dolley, Comment, *Administrative Waiver of the Untimeliness Defense in Title VII Cases Concerning Federal Employees: A Proposed Analysis*, 46 St. Louis U. L.J. 477, 504-05 (2002) (observing that the D.C. Circuit had "developed an unreliable and unnecessarily ad hoc jurisprudence" that "fails to provide a definitive answer to whether the administrative agency waives the untimeliness defense when it is not raised at the administrative level").

A. Two Other Circuits Will Affirm Agency Action Based On An Administrative Forfeiture Not Found By The Agency

Fifth Circuit. The Fifth Circuit will affirm agency action on administrative forfeiture grounds unless the agency made a "specific finding" of timeliness below or rendered a *favorable* decision on the merits of a party's claim. *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992). In *Rowe*, a suspended agency employee filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). The EEOC rejected the complaint and an untimely request for reconsideration. Later, the Fifth Circuit affirmed a district court's holding that the employee's administrative motion for reconsideration was untimely and therefore did not toll the statutory deadline for filing his Title VII lawsuit—which, consequently, was also untimely. The Fifth Circuit held that the EEOC did not waive any timeliness objection by "docketing and acting on [the employee's] request for reconsideration" because the EEOC made no explicit finding of timeliness. *Id.* Indeed, the court explained that even a statement by the EEOC that the "request for reconsideration is timely" would not have "suffic[ed] 'because agencies may inadvertently overlook timeliness problems and should not thereafter be bound.'" *Id.* (citation omitted). *See also Munoz v. Aldridge*, 894 F.2d 1489, 1495 (5th Cir. 1990) ("If an agency makes a specific finding during the administrative process that the administrative complaint was timely, it cannot later defend against a civil complaint by arguing that the administrative complaint was untimely."); *Oaxaca v. Roscoe*, 641 F.2d

386, 390 (5th Cir. Unit A Apr. 3, 1981) (holding that government waives timeliness when "agency has in fact *made a finding of discrimination*") (emphasis added).

Eighth Circuit. In *Otter Tail Power Co. v. STB*, the court held that a party waived an argument by raising it "fatally late" before the STB, 484 F.3d 959, 963 (8th Cir. 2007), even though the agency had resolved the issue on its merits, *see Otter Tail Power Co. v. BNSF*, STB Docket No. 42071, 2006 WL 275904, at *24 (S.T.B. Jan. 27, 2006). The court reasoned that, because the opposing party "had no opportunity to investigate or respond to the [late] challenge nor did the Board have the opportunity to receive evidence relating to [the] challenge," allowing the challenge "would violate the exhaustion rule's principle of '[s]imple fairness to those who are engaged in the tasks of administration, and to litigants ....'" *Otter Tail Power Co.*, 484 F.3d at 963 (quoting *L.A. Tucker Truck*, 344 U.S. at 37).

B. At Least Five Circuits Properly Refuse To Find An Administrative Forfeiture Where The Agency Reached the Merits Without Finding Forfeiture

The Third, Seventh, Ninth, Tenth, and Federal Circuits have squarely held that a court may not refuse to address an argument challenging agency action based on an administrative forfeiture when the agency itself did not find forfeiture and decided the argument on its merits. Two other courts of appeals have indicated in dicta (and/or holdings in unpublished decisions) that they agree.

Seventh Circuit. In *Ester*, the Veterans Administration ("VA") "ruled on the merits of [the plaintiff's employment discrimination] claims without addressing [his] failure to timely file his formal complaint." 250 F.3d at 1073. In its answer in the plaintiff's subsequent Title VII suit, the VA argued for the first time that the plaintiff's complaint before the agency was untimely. The district court agreed and granted the VA summary judgment on that ground. The Seventh Circuit reversed. Citing this Court's decisions in *L.A. Tucker Truck* and *Chenery*, the Seventh Circuit held that, "when an agency decides the merits of a complaint, without addressing the question of timeliness, it has waived a timeliness defense in a subsequent lawsuit." *Id.* at 1071-72. The court explained that, "[i]f an agency indeed believes that a particular complaint is untimely, then the agency needs to state that reason as the one (or as one of many) for its administrative action." *Id.* at 1072. Further, the court reasoned, "values of judicial economy" and "agency autonomy" are served by "requiring objections—even those objections possessed by the agency itself—to be raised in the agency proceeding." *Id.* And, the court pointed out, that rule avoids significant prejudice to "plaintiffs who suddenly must defend [in federal court] a claim of untimeliness never before raised." *Id.* Finally, the court analogized to the federal/state habeas context in which state procedural bars expire if the last state court "'reaches the merits'" of a given federal claim. *Id.* at 1073 (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991)). *Accord Abdelqadar v. Gonzales*, 413 F.3d 668, 670-71 (7th Cir. 2005) (holding that an agency "excuse[s] an alien's failure to exhaust a particular issue" by addressing it on the merits (applying *Salfi*)).

Federal Circuit. In *Hall v. Department of Treasury*, the Federal Circuit "ch[o]se to follow the guidance of the Seventh Circuit" in *Ester*, and likewise held that "an agency waives its timeliness defense when it decides the merits of a complaint without addressing the question of timeliness." 264 F.3d 1050, 1061 (Fed. Cir. 2001). There, a Treasury Department employee in the mid-1990s asked the agency to retroactively credit his years of service, stretching back to 1979, toward the total needed to qualify for an increased retirement benefit. Although an agency regulation limited such credit to the year preceding any such request, the Treasury Department nonetheless considered the employee's request for the entire time period and rejected it on the merits. The court found that the agency had thereby waived any right to rely on its time limitations on appeal. *Id.* at 1061-62. The Federal Circuit has since reaffirmed that position. *See, e.g., Jorge v. Dep't of Treasury*, 19 F. App'x 892, 899 (Fed. Cir. 2001); *Labrada v. Dep't of Treasury*, 19 F. App'x 883, 891 (Fed. Cir. 2001); *see also Turner v. Merit Sys. Prot. Bd.*, 806 F.2d 241, 246 (Fed. Cir. 1986) ("Waiver of the time limit ... is committed to the Board's discretion and we will not substitute our judgment for that of the Board.").

Ninth Circuit. In *Abebe v. Gonzales*, the Board of Immigration Appeals ("BIA") had adopted the decision of an immigration judge, denying petitioner's application for asylum. 432 F.3d 1037 (9th Cir. 2005) (en banc). On appeal, the government argued that the petitioner had forfeited one of his arguments before the BIA. The Ninth Circuit, sitting en banc, rejected the government's argument. The court held that it may not avoid consideration of an issue on administrative

forfeiture grounds when the agency "has ignored a procedural defect and elected to consider an issue on its substantive merits." *Id.* at 1041 (citing *FPC v. Texaco Inc.*, 417 U.S. at 397 (in turn quoting *Burlington Truck Lines, Inc.*, 371 U.S. at 168-69)).

Tenth Circuit. In *Sidabutar v. Gonzales*, the Tenth Circuit held that an agency waives compliance with its own procedural requirements when it "issue[s] a decision considering the merits of an issue, even *sua sponte*." 503 F.3d 1116, 1121 (10th Cir. 2007). Although the petitioner had failed to challenge the immigration judge's ruling in its appeal to the BIA, the BIA waived its own requirement that an issue be "specifically" raised in the notice of appeal by considering the issue on its merits. *Id.* at 1120. The Tenth Circuit explained that agencies are "'free to fashion their own rules of procedure,'" and that a federal court's "role is not to substitute [its] own preference ... for the agency's determination of its internal rules." *Id.* (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940), and citing *Salfi*). Accordingly, "[w]here the BIA determines an issue administratively-ripe to warrant its appellate review, [the court] will not second-guess that determination." *Id.* "The failure to consider" the petitioner's claims on the merits, the court observed, "'would come at the cost of respect for the agency's own judgment regarding its ground for decision,'" and "would amount to a judicial determination that the Board acted *ultra vires* in following its own rules." *Id.* (citation omitted).

Third Circuit. In *Bin Lin v. Attorney General*, the petitioner failed to specify a particular issue in appealing an immigration judge's decision to the BIA, as required by BIA regulations. 543 F.3d 114 (3d Cir.

2008). Adopting much of the Tenth Circuit's reasoning in *Sidabutar*, the Third Circuit held that an agency "waive[s] compliance with [a procedural] requirement by choosing to address [a] petition on the merits" and that the federal courts, therefore, "may not ... reject the petition for review based on that [procedural] requirement." *Id.* at 125.

Other Circuits. Considered reasoning in decisions of the Second and Sixth Circuits indicates that those courts agree with *Ester* and would refuse to find an administrative forfeiture in circumstances such as those present here. For example, in *Bruce v. United States DOJ*, the Second Circuit explicitly agreed with *Ester*'s conclusion that an agency forfeits any timeliness objection by "issu[ing] a final decision on the merits" without addressing timeliness "until the complainant filed suit in federal court." 314 F.3d 71, 74-75 (2d Cir. 2002). Although the court ultimately relied on the agency's "specific finding of timeliness" in finding agency waiver, it determined *Ester* to be "good law." *Id.* at 75. *See also Horton v. Potter*, 369 F.3d 906, 911 (6th Cir. 2004) (noting that an agency waives its timing rules "when the agency decides the complaint on the merits without addressing the untimeliness defense") (citing *Ester*); *Momah v. Dominguez*, 239 F. App'x 114, 121 (6th Cir. 2007) (holding that "the [agency] waived its untimeliness defense by addressing the merits ... at the administrative level without raising a timeliness objection") (citing *Ester*).

II. THE D.C. CIRCUIT FOUND A FORFEITURE BASED ON ITS OWN SUBJECTIVE NOTION OF ADMINISTRATIVE TIMELINESS, IN SQUARE CONFLICT WITH THIS COURT'S PRECEDENTS

The D.C. Circuit's opinion also conflicts with this Court's precedents by asserting a judicial common-law-making authority to fashion and impose administrative forfeiture rules that are different from, or in addition to, those devised by the agency itself.

It has long been settled that a reviewing court will not consider an argument that was not raised before the agency "at the time appropriate under [the agency's] practice." *L.A. Tucker Truck*, 344 U.S. at 37. That principle reflects the agency's power and responsibility to "fashion [its] own rules of procedure," *Pottsville Broad. Co.*, 309 U.S. at 143, which this Court has held should be "left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." *Vt. Yankee*, 435 U.S. at 524.

In *Vermont Yankee*, this Court clarified that a court must not "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 549. And, this Court has since reiterated that "*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements" divorced from any statutory or regulatory requirement. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654-55 (1990) (rejecting lower court's reliance on "fundamental fairness" in attempting to craft procedural requirements).

Together, the principles articulated in *L.A. Tucker Truck* and *Vermont Yankee* prohibit a reviewing court from substituting its judgment for the agency's concerning the timeliness of objections raised before the agency.

The D.C. Circuit's decision in this case, however, does just that, hearkening back to the heady days before *Vermont Yankee* when that court felt empowered to prescribe its own notions of proper agency procedures. *See generally* Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 359 (1978) (discussing prior D.C. Circuit case law and noting that it was "in the process of replacing the rudimentary procedural mandates of the [APA]" and crafting an "'ever-growing common law'") (citation omitted). Here, Congress made the judgment—in keeping with its decision to ease the strictures governing railroad carriers—that a Board investigation must be dismissed if it extends beyond three years. And, the agency entrusted by Congress to make vital, multi-million-dollar rate decisions has a rule explicitly permitting a motion to dismiss to be raised at "anytime during a proceeding." 49 C.F.R. § 1111.5. The agency, following that rule, addressed BNSF's argument that the proceeding must be dismissed for extending beyond the statutory three-year period. The agency did not suggest in its decision that BNSF's challenge was untimely. Under *Vermont Yankee* and its progeny, the D.C. Circuit was not empowered to decree otherwise; it must leave it to the agency to "fashion [its] own rules of procedure," *Pottsville Broad. Co.*, 309 U.S. at 143. Other circuits have recently reiterated this bedrock

principle. *See, e.g.*, *Bin Lin*, 543 F.3d at 125; *Sidabutar*, 503 F.3d at 1120.

The D.C. Circuit averred to this Court's admonition in *L.A. Tucker Truck* (App.15a), but, disregarding *Vermont Yankee*, it proceeded to fashion and apply its own, apparently subjective, rule of administrative waiver, not grounded in statute, rule, or agency practice. As the court's opinion acknowledges, BNSF raised its argument for dismissal under § 11701(c) seven months before the Board issued its final decision, and the Board's own regulations provide that a motion to dismiss may be brought before the Board "at anytime" during the proceedings. 49 C.F.R. § 1111.5. The court pointed to no statute, rule, or agency practice that would have required BNSF to raise the argument sooner than it did. Indeed, it is plain that the Board itself believed the argument *was* timely. The Board addressed the argument on the merits without a word about the timing, and it did not suggest any problem with BNSF's timeliness in its brief to the court of appeals. The D.C. Circuit's decision thus presents a direct challenge to one of this Court's most fundamental holdings on the limits of judicial power. Although petitioner believes that the D.C. Circuit's decision merits plenary review, its error is sufficiently egregious to warrant summary reversal.

This error cannot be dismissed as an aberrant decision by a rogue panel. In *J.J. Cassone Bakery, Inc. v. NLRB*, the D.C. Circuit similarly held that a party forfeited an argument because it was "not timely presented to the Board" without basing that decision on any statute, rule, or agency precedent. 554 F.3d 1041, 1046 (D.C. Cir. 2009). The court observed that the party had missed several earlier opportunities to

raise the argument, but cited nothing—apart from the court's own notions of fairness and efficiency—that would have *required* the party to raise the argument at the earliest opportunity. *Id.* at 1043-44. In finding an administrative forfeiture, the court relied on pre-*Vermont Yankee* circuit precedent. *See id.* at 1044 (citing *Marcus v. Director*, 548 F.2d 1044, 1051 (D.C. Cir. 1976)). And, in this case, the D.C. Circuit denied rehearing en banc on this issue. App.59a-60a.

III. THE QUESTIONS PRESENTED ADDRESS FREQUENTLY RECURRING ISSUES OF NATIONAL IMPORTANCE

The first question presented raises an important and frequently recurring issue of administrative law, on which the decision below deepens a recognized and entrenched circuit conflict. The related, second question presented also warrants this Court's plenary review. The D.C. Circuit's ad hoc determination that BNSF should have raised its argument at some earlier time and therefore "forfeited" the argument at the agency level is flatly contrary to fundamental principles of administrative law recognized by this Court and upsets the fundamental balance that Congress struck between agency authority and federal court review. As this Court stressed in *Vermont Yankee*, the specter of the courts "impos[ing] additional procedural requirements on agency action raises questions of such significance in this area of the law as to warrant ... granting certiorari." 435 U.S. at 535 n.14. *See also Pension Benefit Guar. Corp.*, 496 U.S. at 644 (certiorari granted due to the "significant administrative law questions raised by this case").

Moreover, the identity of the court below argues for immediate review. The D.C. Circuit—with its

nearly ubiquitous jurisdiction over administrative agencies—inevitably exerts disproportionate influence on the other courts and the agencies themselves. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376-77 (2006) (noting that "[o]ne-third of the D.C. Circuit appeals are from agency decisions" whereas "[t]hat figure is less than twenty percent nationwide"); *see also id.* at 389 ("Whatever combination of letters you can put together [in an agency's name], it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit. Even when the jurisdiction is concurrent, as it often is ... lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other circuits."); Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 Geo. L.J. 779, 779 (2002) (noting that "the D.C. Circuit has long dominated and played a major role in shaping" administrative law).

As this Court explained in *Vermont Yankee*, review of an administrative decision of the D.C. Circuit may be especially warranted because "the vast majority of challenges to administrative agency action are brought to the [D.C. Circuit], the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." 435 U.S. at 535 n.14; *see also* John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 Geo. Wash. L. Rev. 553, 562 (2010) (noting that this Court has historically "prioritized review of the D.C. Circuit's administrative law").

The D.C. Circuit has here "unjustifiably intruded into the administrative process," and this Court's guidance is again needed to prevent "'judicial intervention run riot.'" *Vt. Yankee*, 435 U.S. at 556-57 (citation omitted).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted, and the case should be set for briefing and argument or summarily reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

BNSF RAILWAY COMPANY, Petitioner

v.

SURFACE TRANSPORTATION BOARD and United States of America, Respondents

Basin Electric Power Cooperative, Inc. and Western Fuels Association, Inc., Intervenors.

Nos. 09-1092, 09-1190, 09-1234.

Argued Feb. 18, 2010.
Decided May 11, 2010.

604 F.3d 602

Before: HENDERSON, ROGERS and GARLAND, Circuit Judges.

Opinion for the Court by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

BNSF Railway Company ("BNSF") petitions for review of the decision of the Surface Transportation Board ("Board") that rates challenged in 2004 by Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc. (hereinafter, collectively, "WFA") are unreasonably high maximum reasonable rates, prescribing future maximum rates, and ordering

BNSF to pay reparations.[1] BNSF contends that the Board's decision was contrary to law because the three-year limit in 49 U.S.C. § 11701(c) had expired before its February 17, 2009 Decision, and so the Board's orders prescribing maximum reasonable rates and ordering the payment of reparations must be vacated and the proceeding dismissed. Alternatively, BNSF contends there was a reopening after the Board's September 7, 2007 Decision,[2] and hence any reparations would be limited from that time forward. On the merits, BNSF contends the Board was arbitrary and capricious by allowing WFA to revise its traffic route in response to the Board's adoption of new retroactive methodologies for calculating rates, and by modifying the average total cost methodology for allocating revenue from cross-over traffic.

We hold BNSF forfeited the statutory argument by failing to raise it in a timely manner before the Board. On the merits, we conclude that BNSF's challenge to traffic rerouting is unpersuasive and a matter within the Board's expertise, and that a remand is required for the Board to address BNSF's objection to the modified average total cost methodology as biased

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[1] BNSF petitions for review of three Board decisions: The February 17, 2009 Decision, as modified by the June 3, 2009 Decision, and the July 23, 2009 Decision on BNSF's compliance. *See W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2009 WL 415499 (Feb. 17, 2009); *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2009 WL 1567606 (Jun. 3, 2009); *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2009 WL 2221011 (July 23, 2009).

[2] *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2007 WL 2590251 (Sept. 7, 2007) ("September 2007 Decision").

because it double counts variable costs; otherwise we affirm. Accordingly, we grant the petitions in part and deny the petitions in part.

I.

A.

In the Interstate Commerce Commission Termination Act of 1995, Pub.L. 104-88, 109 Stat. 803 (1995) ("ICCTA"), Congress carried forward the shipper protections in the Staggers Rail Act of 1980, Pub.L. 96-448, 94 Stat. 1895 (1980), while continuing the deregulation of the railroad industry it had previously endorsed in the Staggers Act and the Railroad Revitalization and Regulatory Reform Act, Pub.L. 94-210, 90 Stat. 31 (1976). *See* H.R. Conf. Rep. 104-422 (1995), at 194, *reprinted in* 1995 U.S.C.C.A.N. 850; S.Rep. No. 104-176 (1995), at 2-3, 5-6; H.R.Rep. No. 104-311 (1995), at 82-83, *reprinted in* 1995 U.S.C.C.A.N. 793. Thus, a party may file a complaint with the Board, which succeeded the Interstate Commerce Commission ("I.C.C.") as the regulator of the rail industry, challenging the reasonableness of a rate. 49 U.S.C. §§ 11701(b), 10704(b). The Board, upon determining that it has jurisdiction, *id.* §§ 10701(d)(1), 10707(b)-(c), which covers only those railroads that possess "market dominance,"[3] must consider the system-wide pricing policies, *id.* § 10701(d)(2)(A)-(C), and ensure the rail carrier has the opportunity to earn "adequate revenues," *id.* § 10704(a)(2). If the Board finds the challenged rate unreasonable, it "may prescribe" the maximum rate the railroad can charge

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[3] A railroad has "market dominance" if its revenues meet or exceed 180 percent of its variable costs for the traffic to which the rate applies. 49 U.S.C. § 10707(d)(1)(A).

going forward, *id.* § 10704(a)(1), and the railroad "is liable" for reparations to the complainant, *id.* § 11704(b).

The complexity of railroad rate regulation stems in part from determining the proper attribution of costs to those using the railroad's services and facilities. In 1985, the Board promulgated guidelines to calculate rates for shipping coal. *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985) ("*Guidelines*"), *aff'd sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir.1987). The *Guidelines* approach, which was extended to non-coal rates, adopted Constrained Market Pricing ("CMP"), in which rates are set in inverse proportion to shippers' respective demand elasticities, so called "Ramsey pricing." *Guidelines* at 547-48. Under CMP, rates are limited to what is necessary for the carrier to earn adequate revenues based on efficient management and pricing practices. *Guidelines* at 534-42. This determination is made in part based on the stand-alone-cost ("SAC") of a hypothetical carrier or "stand-alone railroad" ("SARR") designed by the complainant to be optimally efficient in providing those lines and facilities needed to serve the complaining shipper. The SAC test determines the maximum rate that the railroad may charge the traffic group by accounting for all the costs of running the SARR, including the cost of building and operation and a reasonable return on investment. Under this test the Board had, over the years, applied Modified Straight-Mileage Prorate ("MSP"), a mileage-based revenue allocation procedure. *See BNSF Ry. Co. v. STB*, 453 F.3d 473, 483-84 (D.C.Cir.2006) (hereinafter "*Xcel*").

In October 2006, the Board revised the *Guidelines* approach upon concluding the regulatory proceedings had become too complex and too costly. *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (Oct. 30, 2006) at 3 ("*Major Issues Rulemaking*"). Previously, the Board had used the "percent reduction" method, by which it reduced the challenged rate by the same percentage by which the total revenues exceeded the SAC costs. In the final rule, the Board changed how it would evaluate rate reasonableness by adopting the Maximum Markup Methodology ("MMM")[4] and the Average Total Cost ("ATC") methodology.[5] This court upheld the final

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[4] Under MMM, the parties calculate the revenue-to-variable cost ("R/VC") needed to cover the SARR's total costs in one year to determine the Benchmark R/VC Ratio. The Board then compares the Benchmark R/VC Ratio to the actual R/VC ratio for each shipper in the traffic group on the SARR to determine if the SAC costs assigned to that shipper's traffic would exceed what the SARR could charge the shipper for the traffic. "Where the actual charge is less than the share of SAC costs that would otherwise be allocated" to a particular shipper under the Benchmark R/VC ratio, "the difference should be reapportioned to the remaining traffic group" and this should be repeated "until no movement in the traffic group is assigned a higher share of the SAC costs than its actual charge." *Major Issues Rulemaking* at 14.

[5] To allocate revenues for cross-over traffic between the defendant railroad and the SARR, the Board abandoned MSP, which it had used for over a decade, *see Xcel*, 453 F.3d at 484. According to this court, the "critical flaw" in this procedure was that it failed to account for "'economies of density'—the principle that the more traffic on a given stretch of rail, the lower the average cost (and hence the lower the cross-over-traffic revenue that should be attributed to it)." *Major Issues Appeal*, 526 F.3d at 782-83 (citing *Xcel*, 453 F.3d at 473). To address the economies of density and "the fact that at some point, higher density no longer results in lower average costs," *id.* at 783, the Board adopted ATC

rule, including its retroactive application. *See BNSF Ry. Co. v. STB*, 526 F.3d 770 (D.C.Cir.2008) ("*Major Issues Appeal*").

B.

From 1984 to 2004, BNSF transported WFA's coal under a long-term contract in which the rate gradually decreased from $4 per ton in 1984 to $3 per ton in 2004. When the contract expired, BNSF and WFA were unable to reach a new agreement and BNSF set a common carrier rate of $6 per ton. Although this rate was, due to the proximity to the Powder River Basin, "one of the lowest transportation rates any utility pays to acquire PRB coal," September 2007 Decision at 2, the revenue to variable cost ratio for these movements was very high, beginning at 481 percent and adjusting upward over time to 843 percent according to WFA.

On October 19, 2004, WFA filed a verified complaint with the Board, seeking to demonstrate the unreasonableness of BNSF's rates under the SAC test. WFA designed a SARR called the Laramie River Railroad ("LRR"), which contained some cross-over traffic and allocated revenues from the crossover traffic using MSP. BNSF filed an answer and the Board granted a motion allowing mediation to continue through January 31, 2005. Once mediation efforts ended, the parties filed evidentiary presentations and in December 2005 they filed final briefs in accordance

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"to derive a system-average fixed cost per route mile," *Major Issues Rulemaking* at 34. Average fixed cost is added to average variable cost to set the average total cost per ton. *Id.* To determine the proper allocation of revenues for the segment, the Board divides the average total cost of the segment by the average total cost of the railroad system. *Id.*

with a briefing schedule that had been extended a number of times.

Then, in February 2006 the Board held in abeyance the pending WFA and AEP Texas North Company ("AEP") proceedings while it conducted the *Major Issues Rulemaking*. At the time, the Board announced its intent to apply to the pending cases whatever new methodology it adopted in three areas, including cross-over traffic. It also stated that at the end of the rulemaking parties in the pending cases would be afforded an opportunity to submit supplemental evidence comporting with changes adopted in the rulemaking, and that "the time frames for issuing a Board decision in those two cases are tolled." *Notice of Proposed Rulemaking*, STB Ex Parte, No. 657 (Sub-No. 1) (Feb. 26, 2006) ("*NPRM*") at 3; *see* 49 U.S.C. § 10704(c) (requiring the Board to issue a decision within 90 days of the close of the record). In October 2006, the Board promulgated the final rule replacing the percentage reduction methodology with MMM and the mileage-based revenue allocation methodology ("MSP") with ATC. *See Major Issues Rulemaking* at 14, 31. On November 8, 2006, the Board ordered the parties to submit supplemental evidentiary presentations, based on the existing SARR proposal, so the Board could apply the new methodologies; the parties completed their supplemental filings by April 2007.

In the September 2007 Decision, *supra* note 2, the Board found that BNSF has market dominance over the transportation at issue. It also found that WFA had failed to establish "on this record" that the challenged rates are unreasonably high, *id.* at 3, but offered WFA an opportunity to submit supplemental

evidence bearing on the new retroactive methodologies. Noting the warning of this court, *see supra* note 5, the Board rejected the idea of continuing to apply "flawed or discredited procedures" while concluding that "fairness dictates that WFA have an opportunity to modify its SAC presentation in light of the new revenue allocation methodology." September 2007 Decision at 20. The Board stated: "Generally, it is not the Board's practice to permit complainants to redesign their case in light of subsequent Board decisions"; however, "[i]n this case, ... the change from MSP to ATC would affect the basic design of a SAC case" because WFA might not have included all of the traffic offering limited revenue contribution or might have changed the configuration of the LRR under ATC. *Id.* The Board gave WFA thirty days to decide, allowing WFA to increase or decrease the traffic group and change the configuration of the LRR and to submit evidence on all related issues. The Board stated it "will discontinue this proceeding" if WFA does not seek to present new SAC evidence. *Id.*

Upon denying the parties' petitions for reconsideration, the Board explained further that "WFA could have been unfairly prejudiced by not knowing when it designed the LRR that the ATC revenue allocation procedure would be applied to its case." February 2008 Denial of Reconsideration at 2.[6] In response to BNSF's argument that there was nothing unfair about applying ATC to WFA's case, the Board emphasized that "[u]sing ATC rather than MSP changes the incentives for a shipper in the selection of

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[6] *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2008 WL 542600 (Feb. 28, 2008) ("February 2008 Denial of Rehearing").

the traffic group to be used." *Id.* at 3. Acknowledging that allowing the supplemental evidentiary presentation "is an unusual measure," the Board cited cases to show "it is not unprecedented," *id.*, and noted that the parties had agreed to a procedural schedule through July 2008 that would include time for additional discovery.

In a supplemental evidentiary presentation filed on May 13, 2008, WFA redesigned its SARR to change LRR's traffic route to exclude some marginally profitable traffic and to include high revenue traffic destined for the WestStar Jeffrey Energy Center ("Jeffrey traffic"). BNSF, in reply of July 14, 2008, argued that the complaint should be dismissed because WFA's use of rerouted traffic was "inconsistent with the limited reopening right afforded by the Board" and a "blatant attempt to game the Board's new Maximum Mark-Up Methodology ('MMM')." BNSF July 2008 Reply at 5, 6. BNSF also renewed a double-counting objection to the modification of ATC adopted in the September 2007 Decision that it had raised in petitioning for reconsideration. And, for the first time, BNSF argued that the WFA proceeding would have to be dismissed in view of the three-year limit in section 11701(c), which, BNSF asserted, commenced with the filing of WFA's verified complaint of October 19, 2004 and the Board's initiation of a formal investigation on that date. *See id.* at 47-49. Alternatively, BNSF argued that the September 2007 Decision was a final decision, such that the extended WFA proceeding was a reopening and no reparations could be awarded for rates charged prior to that time, citing *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389-90, 52 S.Ct. 183, 76 L.Ed. 348 (1932).

In rebuttal of August 15, 2008, WFA noted that "[l]ong after the record initially closed in this case, the Board adopted several new SAC standards in [the] *Major Issues [Rulemaking]* and retroactively applied them," and that WFA had "repeatedly objected to the Board's actions, [arguing] that WFA[] would have modeled a different SARR had the new ... rule the Board adopted in [the] *Major Issues [Rulemaking]* to set SARR crossover traffic revenue divisions been in effect when it modeled the LRR." WFA August 2008 Rebuttal at 2-3. WFA also called the Board's attention to the due process requirements identified in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), that a complainant has the right to an "opportunity to present his case and have its merits fairly judged," and in *Hatch v. FERC*, 654 F.2d 825, 835 (D.C.Cir.1981), that where rules have changed in the middle of the case "litigants must have a meaningful opportunity to submit conforming proof." *See* WFA August 2008 Rebuttal at 65. WFA emphasized that BNSF had not objected to the procedural schedules advancing the proceeding to July 2008 and had stated in filings during the *Major Issues Rulemaking* that delay caused by the rulemaking would not prejudice WFA's case. *See id.* at 66.

In the Decision of February 17, 2009, *supra* note 1, the Board found that the challenged rates were unreasonable, prescribed maximum lawful rates, and ordered BNSF to pay reparations to WFA. In response to the parties' joint petition, the Board, by Decision of June 3, 2009, incorporated technical corrections to the February 2009 Decision. In the Decision of July 23, 2009, the Board found that although BNSF had generally used the correct method

to calculate the maximum lawful rates, it erred in its indexing approach, and ordered BNSF to establish rates, within thirty days, in accordance with the approach in *Oklahoma Gas & Elec. v. Union Pacific R.R.*, STB Docket No. 42111, 2009 WL 2205337 (July 23, 2009). BNSF petitions for review.[7] *See* 28 U.S.C. §§ 2321, 2342, 2344.

II.

BNSF contends that section 11701(c) required the Board to dismiss the WFA proceeding three years after WFA filed its verified complaint on October 19, 2004. The Board responds that this ignores statutory text in section 11701(a) that introduces ambiguity as to whether the three-year limit applies only to investigations initiated by the Board rather than by complaint, and would raise serious constitutional concerns because dismissal without a final decision on the merits would likely deprive complainants of due process. WFA concurs with the Board's interpretation of section 11701(c) and agrees application of the three-year limit to its complaint would violate its basic due process right to receive a final decision on its claim after a full and fair hearing.

Section 11701 provides:

> (a) *Except as otherwise provided in this part*, the Board may begin an investigation under this part only *on complaint*. If the Board finds that a rail carrier is violating this part, the Board shall take

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[7] On October 21, 2009, the Board ordered BNSF within thirty days to pay reparations (with interest) to WFA. *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, STB Docket No. 42088, 2009 WL 3398892 (Oct. 21, 2009).

> appropriate action to compel compliance with this part.
>
> (b) A person ... may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part. * * * The Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Board may not dismiss a complaint ... because of the absence of direct damage to the complainant.
>
> (c) A formal investigative proceeding begun by the Board under subsection (a) of this section is *dismissed automatically* unless it is concluded by the Board with administrative finality by the *end of the third year* after the date on which *it* was begun.

49 U.S.C. § 11701 (emphasis added).

BNSF contends the plain text of section 11701(c) provides that the three-year limit applies only to "formal investigative proceeding[s] begun by the Board under subsection (a)." Pet'r's Br. 28. Subsection (a) authorizes the Board to initiate, BNSF maintains, only one type of proceeding: those brought on complaint. WFA filed a complaint and so, BNSF concludes, the three-year limit in subsection (c) applies to the WFA proceeding, commencing to run on the date WFA filed its complaint. BNSF notes that, in amending subsection (a) to strike text authorizing the Board's predecessor to begin an investigation under this subtitle "on its own initiative," 49 U.S.C. § 11701(a) (as recodified in 1978), Congress in the ICCTA cut back on the Board's authority to initiate formal investigations. *See* H.R. Conf. Rep. 104-422, at 194. BNSF rejects the notion that due process is implicated,

suggesting WFA's complaint is not a protected property interest and recasting WFA's "real objection" to be that the rules of the game changed after it filed its complaint in a way that prevented "fair" adjudication within the three-year limit, a claim under *Hatch* that BNSF maintains was rejected in the *Major Issues Appeal*, 526 F.3d at 784. *See* Pet'r's Br. 36-40. BNSF thus concludes, the WFA proceeding should have been terminated automatically pursuant to section 11701(c) on October 19, 2007 and the Board's subsequent orders should be vacated as contrary to law.

The Board does not suggest the deregulatory context is not a relevant indicator of Congress' intent, only that Congress' failure in the ICCTA to amend section (c) (other than making technical revisions) indicates that Congress intended the Board's interpretation—that the three-year limit applies only to Board-initiated investigations—to continue in force. It notes Congress' contemporaneous addition to subsection (a) of the phrase "except as otherwise provided in this part," such that the ICCTA did not disturb the Board's authority to initiate certain formal investigations under other provisions of Title 49, as, for example, to exercise temporary authority to direct rail operations in rail service emergencies pursuant to 49 U.S.C. § 11123. *See also id.* §§ 10745, 10706(d), 10502(b). Essentially, the Board maintains, as it did in *Xcel*, 453 F.3d at 478-79, that because Congress cannot have intended to punish a complainant for agency inaction, the three-year limit must be read to apply only to investigations begun by the Board on its own initiative. It thus reads "formal investigative proceeding" to refer to such proceedings pursuant to

the "otherwise provided" clause of subsection (a). The Board notes its interpretation is consistent with the I.C.C.'s reading of 49 U.S.C. § 11701 (as recodified in 1978). Because the term "formal investigative proceeding" had an established meaning before the ICCTA was enacted, the Board suggests Congress is presumed to have been aware of that interpretation when it retained the phrase in section 11701(c) in 1995. Any other reading, it maintains, would produce an absurd, unfair, and perhaps even unconstitutional result by depriving a complainant of a decision on the merits of its rate complaint where the delay was not the complainant's fault, perversely rewarding the railroad that managed to prolong a rate proceeding beyond the three-year limit. WFA's right to due process, the Board maintains, would be violated in two ways: lack of a fair opportunity to present its case after the Board changed the rule on revenue allocation for cross-over traffic and failure to receive a final agency decision on the merits.

The conflicting statutory interpretations reprise the arguments made by BNSF and the Board in *Xcel*, 453 F.3d at 479 (D.C.Cir.2006). This court observed then that:

> The Board's concern with due process may be well-founded. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (holding "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause" and therefore could not constitutionally be extinguished by expiration of the 120-day period for state agency to convene a fact-finding conference). We need not resolve the issue of the three-year limit, however, because

> BNSF failed to raise the argument in a timely manner.

Id. So too here.

In *Xcel*, the court explained that "[a] reviewing court generally will not consider an argument that was not raised before the agency 'at the time appropriate under its practice.'" 453 F.3d at 479 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952)). In that case, BNSF raised the three-year limit argument after three and one half years of proceedings, when the Board had ruled against it on the merits and BNSF was petitioning for reconsideration. Without identifying "the exact moment the argument was forfeited," the court concluded "it could not have been later than when the Board decided the case because the criteria for granting reconsideration are limited by statute." *Id.* (citing 49 U.S.C. § 722(c) (requiring "material error, new evidence, or substantially changed circumstances")). The court further rejected BNSF's objection that the "automatic" dismissal provision in section 11701(c) was a "'mandatory directive' ... leav[ing] no discretion in the [Board] to treat its claim as having been forfeited," stating that "[e]ven a defect in the jurisdiction of an agency ... when not timely raised before that agency is forfeit ... unless it 'concerns the very composition or constitution of that agency,'... which BNSF's objection does not." *Id.* (internal citations omitted).

In the instant case, BNSF first argued before the Board that the three-year limit required the WFA proceeding be dismissed in July 2008, after three and three-quarters years of proceedings and nine months after, according to BNSF, the three years had run from

the filing of WFA's verified complaint. This also was ten months after the September 2007 Decision and five months after the Board denied BNSF's petition for reconsideration of the September 2007 Decision. BNSF mentioned the three-year limit in its petition for reconsideration but, as it conceded during oral argument, it did not argue the proceeding had to be dismissed, only that it was "unfair to BNSF to allow this proceeding to continue beyond the three-year cut off ... when the complainants, who have the burden of proof, failed to demonstrate in their original SAC evidence that they are entitled to any relief." BNSF October 2007 Pet. for Reconsideration at 2. In denying reconsideration the Board noted the parties had agreed to a procedural schedule (through July 2008) that would include time for additional discovery. February 2008 Denial of Reconsideration at 8. These are circumstances of forfeiture similar to those identified in *Xcel*, 453 F.3d at 479.

BNSF's explanation during oral argument for its delay in raising the three-year limit argument, that it viewed the September 2007 Decision as a final decision and the later proceeding as a reopening, does not negate the forfeiture. The September 2007 Decision indicated on its face it was not a final decision, affording WFA thirty days to decide whether it wanted to submit supplemental evidence on a new or revised SARR and stating that unless WFA decided to supplement its evidence the proceeding "*will* be discontinued." September 2007 Decision at 20 (emphasis added). Even though BNSF could have filed a motion to dismiss at any point in the WFA proceeding, *see* 49 C.F.R. § 1111.5, it stood silent before the Board after the denial of its petition for

reconsideration in February 2008 and while WFA prepared and presented a revised SARR to the Board in May 2008. BNSF also stood silent before the Board after the Board filed a motion on May 19, 2008 to dismiss the appeal of the September 2007 Decision as premature,[8] waiting two months after the Board's motion to argue the three-year limit before the Board, *see* BNSF July 14, 2008 Reply at 47-49, even though BNSF had argued before this court in response to the Board's motion to dismiss that the pending proceedings were otherwise improper because they extended beyond the three-year limit, citing *Xcel*'s holding on "waiver," 453 F.3d at 480. *See* June 3, 2008 BNSF Resp. to Board's Mot. to Dismiss at 14-15, *W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, Docket No. 08-1167 (D.C.Cir. Jun. 3, 2009). Under the circumstances BNSF did not timely present the three-year limit argument to the Board. *See Xcel*, 453 F.3d at 479.

Although this court has held that a forfeiture can be forfeited by failing on appeal to argue an argument was forfeited, *see Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337, 344 (D.C.Cir.2004); *Bowden v. United States*, 106 F.3d 433, 438-39 (D.C.Cir.1997), that precedent is inapplicable. The Board never acquiesced in BNSF's view that section 11701(c)'s three-year limit applied to complaint-initiated investigations and rejected BNSF's argument on the merits when it was first raised in July 2008.

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[8] This court dismissed the appeal. *See W. Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry. Co.*, Docket No. 08-1167 (D.C.Cir. Jun. 3, 2009).

III.

On the merits, BNSF contends the Board's Decision is arbitrary and capricious for allowing WFA to reroute traffic in its May 2008 evidentiary presentations and in modifying ATC. Our review is deferential, looking to see whether the decision is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" 5 U.S.C. § 706(2)(A), (E), "bearing in mind that '[w]here an agency has rationally set forth the grounds on which it acted, ... this court may not substitute its judgment for that of the agency.'" *Xcel*, 453 F.3d at 480 (internal citation omitted).

BNSF maintains that the Board did not hold WFA to its burden to justify its traffic selection and failed to explain why WFA's rerouting of traffic was consistent with SAC principles. BNSF objected in July 2008 to WFA's revised traffic selection that included high rated "Jeffrey traffic" on the ground that it was beyond what the Board had authorized in the September 2007 Decision. On appeal, BNSF suggests that the "Jeffrey traffic" "shares virtually no facilities with WFA's traffic," Pet'r's Br. 46, and that together with the dropped profitable but lower-rated traffic it did nothing to advance the objectives of the SAC test.

The Board determined that WFA's replacement of the lower-rated 19 million tons of traffic with higher-rated "Jeffrey traffic" was within the "broad flexibility" allowed by the *Guidelines* at 543-44. Explaining that "every choice made by a complainant in designing a SARR will be done with an eye to reducing the maximum lawful rate produced under the SAC test" and that the traffic choice is valid "[s]o long as the complaint does not violate any SAC rule or

principle in the process," February 2009 Decision at 7, the Board concluded the "Jeffrey traffic" met the criteria for inclusion by demonstrating that "the route is reasonable and would meet the shipper's transportation needs," *id.* at 11 (citing *Tex. Mun. Power Agency v. BNSF*, 6 STB 573, 589 (2003)).

The court will defer because the Board's determination invokes its expertise, *see Major Issues Appeal*, 526 F.3d at 774, and we find no fault with the Board's reasoning. The Board's approval of the rerouted traffic is consistent with the Board's precedent that the complainant designing the system from scratch has "broad flexibility to develop the least costly, most efficient plan" and to select the traffic group, including crossover traffic, for its SARR. *Guidelines* at 543-44; *see Duke Energy Corp. v. CSX Transp., Inc.*, 7 STB 402, 417 (June 2003-Dec.2004), 2004 WL 250254, at **10-11. BNSF presents no persuasive argument to question the Board's reasonable distinction between requiring a compelling justification for changing a traffic route only where the selected traffic shares no facilities in the real world, and requiring only that the complainant account for any off-SARR changes where the selected traffic shares at least some facilities in the real world, as does the "Jeffrey traffic." *See* February 2009 Decision at 11 n. 16; *see also Duke Energy*, 7 STB at 418, 2004 WL 250254, at *11; *Pub. Serv. Co. of Colo. d/b/a Xcel v. Burlington N. and Santa Fe Ry. Co.*, 7 STB 589, 607-08 (June 2003-Dec.2004), 2004 WL 1428724, at * 12.

BNSF also contends the Board's modification of ATC in the September 2007 Decision was arbitrary and capricious because modified ATC fails appropriately to consider economies of density and artificially inflates

the revenues attributable to the SARR. It suggests that in the *Major Issues Rulemaking* "[t]he Board recognized that it must consider the relative average total costs of each segment, rather than their average variable costs, in order to take adequate account of economies of density." Pet'r's Br. 50 (citing the *Major Issues Rulemaking* at 34-35 and the *NPRM* at 20). BNSF maintains that under the Board's two-step approach—by assigning revenues to cover the variable costs in step one without reflecting economies of density, and by then allocating any remaining revenues to cover the fixed costs plus the variable cost in step two taking economies of density into account—variable costs are counted twice. In BNSF's view, this "all but ignores the fundamental purpose of ATC (accounting for the economies of density)." Pet'r's Br. 51. The effect, BNSF claims, is that the high-density SARR segments tend to receive a disproportionately large share of revenues leaving the incumbent carrier with insufficient revenues to cover the proportionally higher cost of lower-density off-SARR lines.

The Board determined upon applying ATC, as adopted in the *Major Issues Rulemaking*, that it had not accounted for a situation in which low-rated cross-over traffic did not cover its own variable costs for portions of the rail movement. *See* September 2007 Decision at 14. The Board explained that "[b]ecause the traffic group includes considerable traffic with total revenue either below or barely above variable cost, and because the off-SARR segments of the movements have lower densities, the practical effect of the parties' approach would be to drive the R/VC percentages of the movements below 100%," meaning "the on-SARR revenue allocation for those movements would be

insufficient to cover the variable cost ... of handling traffic for the highest-density portion of a movement." *Id.* at 14. "To avoid such an illogical and unintended result," *id.*, the Board modified ATC. "Instead of applying ATC allocation procedure to total revenue, we will apply the same allocation procedure to total revenue *contribution*" so that "the revenue assigned to the on-SARR part of a cross-over movement will equal the variable cost to haul the traffic over the facilities replicated by the SARR plus the portion of available revenue contribution allocated in accordance with ATC." *Id.* (emphasis in original).

On appeal the Board acknowledges that it "did not specifically mention 'double-counting'" in denying BNSF's petition for reconsideration of the September 2007 Decision. Resp't Br. 63. Rather, the Board stated that modified ATC would not reintroduce bias because it is "even-handed." February 2008 Denial of Reconsideration at 4-5. The Board noted that BNSF had previously suggested adoption of a similar methodology, the Density Adjusted Revenue Allocation ("DARA"). *Id.* at 5. However, the Board had rejected DARA as being "insensitive to the actual economies of density associated with particular movements" and observed that ATC, as adopted in the *Major Issues Rulemaking*, "does not suffer from the deficiency that led to the Board's rejection of DARA." *Major Issues Rulemaking* at 26. WFA has offered a response in its brief at 35-36, explaining that BNSF's concern with double-counting is not problematic because step one recognizes that average variable costs do not vary with density, while step two recognizes that average total cost declines as density increases because the fixed costs are "spread over a larger

number of traffic units," WFA Br. at 36. However, the Board never relied on this rationale and so cannot do so on appeal. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

Accordingly, we grant the petitions in part, so that the Board on remand can address BNSF's double-counting objection to modified ATC, and we otherwise deny the petitions.

SERVICE DATE – SEPTEMBER 10, 2007

This decision will be printed in the bound volumes of the STB printed report at a later date.

SURFACE TRANSPORTATION BOARD
DECISION

STB Docket No. 42088

WESTERN FUELS ASSOCIATION, INC., AND
BASIN ELECTRIC POWER COOPERATIVE
v.
BNSF RAILWAY COMPANY

Decided: September 7, 2007

The Board finds that the defendant railroad has market dominance over the transportation at issue, but that the complainant has failed to establish that the challenged rates are unreasonably high. Complainants are offered an opportunity to submit supplemental evidence under the stand-alone cost constraint.

* * *

BY THE BOARD:

OVERVIEW

This case involves a rate dispute between Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively, WFA), and BNSF Railway Company (BNSF) over the maximum lawful rate BNSF can charge to haul 8 million tons of coal each year from the Powder River Basin (PRB) in

Wyoming a short distance (200 miles) to WFA's Laramie River Station coal-fired electric utility plant at Moba Junction, WY. The Laramie River plant is served only by BNSF and there are no feasible transportation alternatives for transporting PRB coal to this facility. The reasonableness of the common carriage rates established by BNSF is therefore subject to our jurisdiction.

Prior to this dispute, rail transportation to the Laramie River plant was handled by a mutually agreeable contract entered into in 1984. This 20-year contract was the product of a settlement of an antitrust case brought by WFA against BNSF, which claimed the carrier had unlawfully exploited its monopoly position in the PRB. Under the terms of the contract, the transportation rate dropped in nominal terms from $4 per ton (in 1984) to $3 per ton (in 2004). During that same time period, railroad costs increased approximately 60% and demand for PRB coal production increased by 500%. When the contract expired in 2004, the parties were unable to negotiate another rail transportation contract. BNSF therefore established a common carrier rate, which was twice the expired contract rate, or roughly $6 per ton.

Because WFA's plant is located so close to the PRB, its rate to the Laramie River plant is one of the lowest transportation rates any utility pays to acquire PRB coal. Many utilities that desire the low-sulfur PRB coal are located in distant states such as Texas or Georgia, and pay two or three times this rate. Even in comparison to other utilities located near (but not quite as close to) the PRB mines, the rate is low on a dollar-per-ton basis. The rate is also low in comparison to

other PRB rates that have been challenged before the Board as unreasonable by other captive shippers.

Nonetheless, WFA considers the $6 rate unreasonable. As it points out, the challenged rate is twice the expired contract rate, and (because the plant is only 200 miles from the PRB) the rate per mile far exceeds the rate per mile paid by utilities located further away. Standing alone, however, these facts do not indicate that the new rate is unlawful or what the maximum reasonable rate would be. Accordingly, WFA sought to demonstrate that, under the Board's stand-alone cost (SAC) test, it is cross-subsidizing other BNSF traffic by paying more than is needed to provide a reasonable return on the rail facilities necessary to serve WFA. It contended that the maximum lawful rate under the SAC test should be $3.10 per ton (in 2005) and sought more than $20 million per year in rate relief until the year 2024.

The record does not support WFA's claims, however. The cost of the 200 miles of rail facilities needed to serve WFA and other traffic WFA selected to share those expenses would be $870 million. Yet the revenue generated from this traffic—including the $50 million WFA would pay annually under the challenged $6 rate—less operating and maintenance expenses would provide a return on this investment that is less than the cost of capital for the railroad industry. As such, it would appear that WFA is only being asked to pay for the 200 miles of rail facilities it uses, and is not being forced to cross-subsidize other parts of BNSF's broader rail network.

WFA asserts, however, that the reason its SAC presentation does not demonstrate that the rates are unreasonable is because the Board changed certain key

procedures after WFA submitted its SAC presentation. See Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) et al. (STB served Oct. 30, 2006) (Major Issues), pets. for judicial review pending sub nom. BNSF Ry. v. STB, No. 06-1372 et al. (D.C. Cir. filed Nov. 14, 2007). WFA argues strenuously, and persuasively, that had it known that the Board would change the revenue allocation methodology for cross-over traffic, it would have offered a different case. The change to the revenue allocation methodology clearly could have prejudiced WFA. Given these circumstances, we have contemplated two alternatives. We could apply the old procedures that WFA relied upon, but which have been discredited and replaced with superior procedures. Alternatively, we could use the new procedures, but permit WFA to submit supplemental SAC information if it believes a revised case could demonstrate that the challenged rate is unreasonable.

We believe fairness dictates that WFA have an opportunity to modify its SAC presentation in light of the new revenue allocation methodology. Generally, it is not the Board's practice to permit complainants to redesign their case in light of subsequent Board decisions. In this case, however, the change would affect the basic design of a SAC case. For example, WFA included in its traffic group considerable traffic offering limited revenue contribution, as those movements are to competitively served plants. This may have been a reasonable design choice under the old revenue allocation method. But under the new approach, WFA might not have included all that traffic or might have changed the configuration of the stand-alone railroad (SARR).

This course strikes a reasonable balance by seeking to maintain reasonable rates where there is an absence of competition while promoting a safe and efficient rail system in which carriers are allowed to earn adequate revenues. See 49 U.S.C. 10101. We appreciate that redesigning its SAC presentation will require WFA to incur more litigation expenses. But we cannot, as WFA has urged, use now-discredited procedures to resolve a dispute involving millions of dollars and establish rate prescriptions that would extend for two decades. Moreover, the principal change WFA complains of is the adoption of a new revenue allocation procedure. But that change was foreshadowed by a recent federal court decision, which warned the Board that continued use of the old approach was "on shaky ground indeed." BNSF Ry. v. STB, 453 F.3d 473, 484 (D.C. Cir. 2006). As such, any attempt to apply the old revenue allocation approach might not benefit WFA in any event, as the use of the discredited method might not survive judicial review.

The decision below sets forth the evidentiary disputes, our resolution of those issues, and the basis for our conclusion that WFA has failed to demonstrate, on this record, that the challenged rates are unlawful under the SAC test. WFA will have 30 days to inform us whether it wishes to submit supplemental SAC evidence. If it chooses not to do so, we will discontinue this proceeding.

PROCEDURAL HISTORY

By complaint filed on October 19, 2004, WFA, challenges the reasonableness of rates charged by BNSF for unit-train movements of coal from origins in Campbell and Converse Counties, in the PRB of Wyoming, to Basin Electric's Laramie River Station

(LRS) near Moba Junction, WY. The rail transportation to LRS electric generating station was previously provided by BNSF under a transportation contract. When that contract was not renewed, BNSF established common carriage rates (in Common Carrier Pricing Authority 90077), effective on October 1, 2004. WFA seeks to demonstrate the unreasonableness of these rates under the agency's stand-alone cost (SAC) methodology.

The parties filed their opening presentations on March 19, 2005, their reply evidence on July 20, 2005, and their rebuttal evidence on October 3, 2005. BNSF filed a motion to strike portions of WFA's rebuttal evidence on October 20, 2005.

On February 27, 2006, the Board held this proceeding in abeyance so that it could consider various recurring methodological issues that had been raised or were implicated in the pending rate cases. See Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1), et al. (STB served Feb. 27, 2006). WFA and BNSF, along with other interested parties, filed opening comments on the proposed rules on May 1, 2006, reply comments on June 1, 2006, and rebuttal comments on June 30, 2006. We issued final rules on October 30, 2006, adopting all of the proposed changes to our ratemaking procedures.

Meanwhile, by decision served on March 17, 2006 (First Compliance Order), the Board directed both parties to file additional evidence in this proceeding to address some gaps in the evidentiary record. In response, WFA submitted supplemental opening evidence on May 15, 2006, BNSF submitted supplemental reply evidence on June 15, 2006, and

WFA submitted supplemental rebuttal evidence on July 14, 2006.

After we completed the rulemaking,[1] we issued a further decision in this proceeding on November 8, 2006 (Second Compliance Order), directing the parties to file additional evidence to reflect the methodological changes adopted in Major Issues. Accordingly, WFA filed second supplemental opening evidence on February 22, 2007, BNSF filed second supplemental reply evidence on March 26, 2007, and WFA filed its second supplemental rebuttal evidence on April 9, 2007.

* * *

F. Implementation of New Procedures

WFA objects to the application of the new procedures adopted in Major Issues to this case. It argues that, had it known the Board would apply the different revenue allocation method, it would have designed a different SARR. WFA therefore has asked that we apply the old procedures, particularly the MSP method for allocating revenues from cross-over traffic. Presumably, WFA would have us apply all the old procedures—even those which favor the carrier such as the percent reduction method or forecasting operating expenses without any adjustment for productivity—and not just those that favor WFA.

We do not believe it is appropriate to apply flawed or discredited procedures, rather than the superior procedures adopted in Major Issues. With regard to the revenue allocation methodology, which is the focus

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[1] Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) et al. (STB served Oct. 30, 2006) (Major Issues), pets. for judicial review pending sub nom. BNSF Ry. v. STB, No. 06-1372 et al. (D.C. Cir. Filed Nov. 14, 2007).

of WFA's objections, a federal court has explicitly warned that, if the Board were "presented with a model that took account both of the economies of density and of the diminishing returns thereto, a decision to adhere to its MSP model would be on shaky ground indeed."[27] Moreover, while complainants may have relied on MSP in designing the SARR, they should have been aware that the Board had no established methodology (e.g., PPL at 7. n.14 and Duke/NS at 17 n.27), that the MSP approach has long been under attack, (e.g., Xcel at 17-19 and Otter Tail at 13-17) and that the Board has stated its preference for an approach that can take economies of density into account (see Duke/NS at 22).

Nonetheless, we believe fairness dictates that WFA have an opportunity to modify its SAC presentation in light of the new revenue allocation methodology. Generally, it is not the Board's practice to permit complainants to redesign their case in light of subsequent Board decisions. In this case, however, the change from MSP to ATC would affect the basic design of a SAC case. For example, WFA included in its traffic group considerable traffic offering limited revenue contribution, as those movements are to competitively served plants. This may have been a reasonable design choice under MSP, which over-allocated revenue to the SARR. But under ATC, WFA might not have included all that traffic or might have changed the configuration of the LRR.

Accordingly, WFA should inform the Board, within 30 days of the service date of this decision, if it wishes to supplement or revise its SAC presentation. WFA

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[27] BNSF Ry. v. STB, 453 F.3d 473, 484 (D.C. Cir. 2006).

may increase or decrease the traffic group, change the configuration of the LRR, and submit evidence on all related issues (such as the revenue from new traffic or construction costs avoided or added due to a new configuration). However, neither party will be allowed to use this reopening of the record to relitigate unrelated issues (such as how to account for non-SARR traffic at the PRB mines).[28] If WFA elects to pursue this option, it should suggest an appropriate procedural schedule. If WFA does not seek to present new SAC evidence, we will discontinue this proceeding.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF's motion to strike and request to submit limited sur-rebuttal is denied.

2. The unreasonable practice allegations are dismissed.

3. WFA shall advise the Board within 30 days of the service of this decision whether they wish to submit supplemental SAC evidence.

4. This decision is effective on October 10, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

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[28] Parties should use the 20-day reconsideration period to identify technical or substantive errors in this decision based on the record developed to date. This 20-day deadline is not stayed pending possible supplemental evidence from WFA.

SERVICE DATE – LATE RELEASE FEBRUARY 18, 2009

This decision will be printed in the bound volumes of the STB printed reports at a later date.

SURFACE TRANSPORTATION BOARD
DECISION

STB Docket No. 42088

WESTERN FUELS ASSOCIATION, INC., AND BASIN ELECTRIC POWER COOPERATIVE
v.
BNSF RAILWAY COMPANY

Decided: February 17, 2009

The Board finds that the defendant railroad has market dominance over the transportation at issue and that the challenged rates are unreasonably high. Maximum reasonable rates are prescribed and reparations are ordered.

* * *

BY THE BOARD:

OVERVIEW

This case involves a rate dispute between Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively, WFA), and BNSF Railway Company (BNSF). The dispute is over the reasonableness of the rates BNSF charges to WFA for hauling 8 million tons of coal each year from mines in the Powder River Basin (PRB) in Wyoming to WFA's

Laramie River Station plant (LRS) at Moba Junction, WY. Because the rate is a common carriage rate and the LRS plant is captive to BNSF, the reasonableness of the rate is subject to our jurisdiction.

In its first attempt, WFA failed to show the challenged rates to be unreasonable under our stand-alone cost (SAC) test. But WFA had designed its SAC presentation under one set of rules, only to have those rules changed during the course of the proceeding. See Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) (STB served Oct. 30, 2006), aff'd sub nom. BNSF v. STB, 526 F.3d 770 (D.C. Cir. 2008) (Major Issues). We recognized that the change in revenue allocation procedure could have affected the optimal size and configuration of the stand-alone railroad (SARR) designed by WFA. Therefore, in our decision in the proceeding served on September 10, 2007 (Sept. 2007 Decision), we afforded WFA the opportunity to redesign the SARR to address the new revenue allocation procedure and to submit supplemental evidence based on that redesign.

In this second attempt, WFA has succeeded in making its case. Although the challenged rates are among the lowest transportation rates any utility pays to receive PRB coal, WFA has shown that its rates far exceed the level BNSF needs to charge to earn a reasonable return on the full replacement cost of the facilities used to serve WFA, because the Laramie River Station plant is located so close to the PRB. As such, it is now clear that BNSF has been forcing WFA to cross-subsidize other parts of BNSF's broader rail network that WFA does not use. This is prohibited. So although the challenged rates appeared on their face to be commercially reasonable, they exceed by a wide

margin the level BNSF is permitted to charge under the SAC test.

Accordingly, we will order BNSF to pay reparations to WFA (with interest) for shipments dating back to the fourth quarter of 2004, and we will prescribe the maximum lawful rate that BNSF can charge until 2024. The maximum lawful rate is expressed as a revenue-to-variable cost ratio. Although it varies from year-to-year, the maximum lawful rate BNSF may charge in 2009 is roughly 240% of its variable costs, which translates to a roughly 60% reduction in the transportation rate.

This amounts to the single largest reduction in rail rates ever ordered by this agency. Although the record does not provide the data needed to calculate precisely the total amount of reparations due to WFA, we estimate that reparations are roughly $28 million per year. We further estimate that the total relief WFA will obtain as a result of this order—including both reparations and the lower prescribed rate through 2024—will approximate $345 million (in current dollars).

Following our standard practice, the parties are to calculate the total amount of reparations and interest due, in accordance with this decision. If they cannot agree, the parties should bring the dispute to our attention for prompt resolution.

* * *

D. Scope of Recoverable Relief

BNSF makes three arguments for why the Board should award no damages for movements before the date of the Sept. 2007 Decision. First, it claims that Arizona Grocery Co. v. Atchison, Topeka & Santa Fe

Railway Co., 284 U.S. 379 (1932) (Arizona Grocery), precludes the Board from awarding retroactive relief before this phase of the proceeding. BNSF asserts that the Arizona Grocery principle applies here because the Board conclusively resolved WFA's rate complaint when we found the challenged rate reasonable in the Sept. 2007 Decision and that the rate then became the lawful rate. Thus, the shipments that moved under the rate addressed in the Sept. 2007 Decision cannot be subject to retroactive change, it argues. Alternatively, if the Board considers the Sept. 2007 Decision as a preliminary decision in this proceeding, rather than a final decision under Arizona Grocery, BNSF argues that the Board violated the requirement of 49 U.S.C. 11701(c) that the proceeding be completed within 3 years. Finally, BNSF asserts that fairness dictates that this decision be given only prospective relief.

We will deny BNSF's request to limit the damages available to WFA. First, Arizona Grocery is not applicable, as we did not conclusively resolve WFA's rate complaint in the Sept. 2007 Decision. Rather, we concluded that, based on WFA's submission, the rates did not *appear* to be unreasonably high. But we also recognized that, by our having changed the substantive standards, WFA had not had a fair chance to make its case. It had designed its case under one standard, only to have it judged under another. Following well-established legal precedent, we therefore provided WFA an opportunity to redesign pertinent aspects of its case and submit revised evidence under the new legal standards. Accord Hatch v. FERC, 654 F.2d 825, 835 (D.C. Cir. 1981). Thus, there was nothing final about the Sept. 2007 Decision.

Second, the 3-year timetable in 49 U.S.C. 11701(c) does not apply to rate cases begun on complaint. See AEP Texas North v. BNSF Ry., STB Docket No. 41191 (Sub-No. 1) (STB served Nov. 13, 2006); Complaints Filed Pursuant to the Savings Provision of the Staggers Rail Act of 1980, 367 I.C.C. 406 (1983). The timetable applies only in those circumstances where the Board institutes a proceeding on its own initiative.

Third, fairness dictates that WFA receive the full relief afforded it under the statute. WFA has shown the challenged rate to be unreasonable under the standards adopted in Major Issues. Accordingly, WFA has a statutory right to reparations. 49 U.S.C. 11704. Under the SAC test, BNSF can charge a rate that provides a reasonable return on the full replacement cost of the rail assets needed to serve WFA, but no more.

* * *

It is ordered:

1. BNSF's motion to strike is denied.

2. BNSF's motion to dismiss is denied.

3. BNSF is ordered to pay reparations to WFA in accordance with this decision and to establish and maintain rates for movements of the issue traffic that do not exceed the maximum reasonable revenue-to-variable cost levels prescribed in this decision.

4. This decision is effective on March 20, 2009.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

SERVICE DATE – JUNE 5, 2009

SURFACE TRANSPORTATION BOARD
DECISION

STB Docket No. 42088

WESTERN FUELS ASSOCIATION, INC., AND
BASIN ELECTRIC POWER COOPERATIVE
v.
BNSF RAILWAY COMPANY

Decided: June 3, 2009

In this proceeding, Western Fuels Association, Inc. and Basin Electric Power Cooperative (collectively, WFA) challenged the reasonableness of the rates charged by BNSF Railway Company (BNSF) for movements of coal from origins in the Powder River Basin (PRB) in Wyoming to WFA's Laramie River Station coal-fired electric utility plant at Moba Junction, WY. In a decision served on February 18, 2009 (February '09 Decision), we found that WFA had shown that BNSF has market dominance over those movements, and that its rates exceeded the level BNSF needed to charge to earn a reasonable return on the full replacement cost of the facilities used to serve WFA. Accordingly, we ordered BNSF to pay reparations to WFA (with interest) for shipments dating back to the fourth quarter of 2004.

On March 10, 2009, WFA and BNSF filed a joint petition to correct technical and computational errors. As discussed below, we agree that errors were made in certain density and variable cost calculations in the

February '09 Decision which affect the application of the Board's discounted cash flow (DCF) model. We correct those errors as discussed herein.

DISCUSSION AND CONCLUSIONS

The February '09 Decision contained certain density and variable cost calculations in applying the average total cost (ATC) procedure for calculating revenue divisions for cross-over traffic. WFA posited that some traffic would traverse its stand-alone railroad (SARR) via a different routing than that by which that traffic actually moves over BNSF's system. In reliance on BNSF's evidence, the Board mistakenly calculated the revenues allocated to the SARR based on the costs and densities associated with the new SARR re-routings of those movements, not, as the Board intended, over the actual, historical routing. See February '09 Decision at 13-15.

In particular, the parties identified revenue divisions for six movements that were incorrectly calculated in the February '09 Decision: (1) PSCO/Xcel move from Eagle Butte Mine to Pawnee, CO; (2) Reliant Energy move from Buckskin Mine to Smither's Lake, TX; (3) TXU Energy move from Eagle Butte Mine to Big Brown, TX; (4) West Texas Utilities move from Buckskin Mine to Oklaunion, TX; (5) West Texas Utilities move from Rawhide Mine to Oklaunion, TX; (6) West Texas Utilities move from Caballo Rojo Mine to Oklaunion, TX.

We agree with the parties that the revenue divisions for these six movements were incorrectly calculated and now fix the error to reflect the actual routing, as described in the February '09 Decision. The revised data has been re-incorporated into the DCF analysis. As shown in the revised tables below, the

result of these changes yields slightly higher maximum revenue to variable cost (R/VC) ratios.

[Tables 1-3 omitted.]

The parties have also filed a number of pleadings regarding whether the rates recently established by BNSF comply with the February '09 Decision. That dispute centers on compliance with the February '09 Decision, rather than whether the February '09 Decision is correct. Questions about compliance will be resolved in a newly created sub-docket in this proceeding. See Western Fuels Association, Inc., and Basin Electric Power Cooperative v. BNSF Railway Company – Compliance, STB Docket No. 42088 (Sub-No. 1). Today's decision thus concludes with finality the administrative proceeding establishing the maximum lawful revenue-to-variable cost levels for the traffic at issue.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WFA's and BNSF's joint petition to correct technical and computational errors is granted.

2. The rate prescription and reparations award in this case are revised as discussed above. The parties are ordered to re-calculate the amount of reparations, and BNSF shall establish and maintain rates for movements of the issue traffic that do not exceed the maximum reasonable revenue-to-variable cost levels prescribed by the February '09 Decision, as corrected here.

3. This decision is effective on its service date.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary

SERVICE DATE – LATE RELEASE JULY 27, 2009

SURFACE TRANSPORTATION BOARD
DECISION

STB Docket No. 42088 (Sub-No. 1)

WESTERN FUELS ASSOCIATION, INC., AND
BASIN ELECTRIC POWER COOPERATIVE
v.
BNSF RAILWAY COMPANY

Decided: July 23, 2009

The Board finds that the defendant railroad has not established transportation rates in accordance with the rate prescription in STB Docket No. 42088. The Board therefore orders the railroad to establish maximum lawful rates in accordance with the methodology described in Oklahoma Gas & Elec. v. Union Pacific R.R., STB Docket No. 42111 (STB served July 24, 2009).

BY THE BOARD:

OVERVIEW

In the lead docket, No. 42088, Western Fuels Association, Inc. and Basin Electric Power Cooperative (collectively, WFA) challenged the reasonableness of the rates charged by BNSF Railway Company (BNSF) for movements of coal from origins in the Powder River Basin (PRB) in Wyoming to WFA's Laramie River Station (LRS) coal-fired electric utility plant at Moba Junction, WY. In a decision served on February

18, 2009 (February '09 Decision), we found that BNSF has market dominance over those movements and that the challenged rates were unreasonably high. Accordingly, we ordered BNSF to pay reparations to WFA (with interest) for shipments dating back to the fourth quarter of 2004. In a further decision, served on June 5, 2009 (June '09 Decision), we modified the rate prescriptions to correct an error in certain density and variable cost calculations.

We must now resolve a dispute between WFA and BNSF over whether the rates BNSF established on March 20, 2009, exceed the maximum lawful levels prescribed in the February '09 Decision, as modified in the June '09 Decision. We find that BNSF has used the proper method in general for calculating the maximum lawful rates in 2009, but erred in its indexing approach. The rates it established therefore exceed the permissible maximum revenue-to-variable cost (R/VC) ratio for 2009.

Accordingly, BNSF is ordered to establish transportation rates that comport with our June '09 Decision. We have calculated, for the first two quarters of 2009, the maximum lawful rates from each of the 12 PRB mines embraced in the rate prescription. BNSF should in turn establish the proper rates for the third quarter of 2009, and adjust those rates quarterly in the manner described in Oklahoma Gas & Elec. v. Union Pacific R.R., STB Docket No. 42111 (STB served July 24, 2009).

Once BNSF establishes updated rates, WFA should calculate the precise amount of reparations due and submit its statement of damages to BNSF, in accordance with 49 CFR 1133.2. BNSF itself has estimated that it now owes WFA roughly $112 million

in reparations, but this calculation is too conservative given our finding that BNSF has established rates in excess of those permitted by our February '09 Decision and June '09 Decision. If the parties cannot resolve the precise amount of reparations due, WFA may bring the dispute to our attention.

BACKGROUND

1. Prior Decision Finding Challenge Rates Unreasonable

This case involves a large rate dispute between WFA and BNSF over the reasonableness of the rates charged to haul 8 million tons of coal each year from mines in the PRB in Wyoming to the LRS generating plant. Because these are common carriage rates and BNSF possesses market dominance over WFA's shipments to the LRS plant, we have both jurisdiction over the rates and authority to review their reasonableness when challenged.

In the February '09 Decision, we found that the challenged rates were unreasonably high and ordered BNSF to lower its rates and reimburse WFA for any overpayments, including interest. We did not, however, prescribe specific rates for transportation from the 12 PRB origin mines at issue. Instead, we ordered BNSF to maintain rates that did not exceed a prescribed R/VC ratio. After minor corrections in the June '09 Decision, we prescribed the maximum lawful R/VC ratios that BNSF is permitted to charge WFA for transportation from these 12 PRB mines to the LRS plant (between 2004 and 2024) as follows:

[Table 1 omitted.]

2. Maximum Markup Methodology

The approach followed in this case to establish the maximum lawful R/VC ratios reflected the application of significant innovation in our rate procedures for handling large rail rate disputes. In Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) (STB served Oct. 30, 2006), aff'd sub nom. BNSF v. STB, 526 F.3d 770 (D.C. Cir. 2008) (Major Issues), we adopted an entirely new approach to calculate maximum lawful rates in such cases, called the "Maximum Markup Methodology" (MMM). Under MMM, we calculate a maximum R/VC ratio that limits the amount of demand-based differential pricing the defendant carrier can engage in for a given year. Under this new approach, we no longer prescribe fixed transportation rates for as many as 20 years, as was our practice in prior large rate cases, but instead we prescribe an R/VC ratio that permits the transportation rate to change from year to year (or from quarter to quarter) to reflect changes in the rail operating costs, such as fuel costs.

Accordingly, in this case we ordered BNSF to establish and maintain rates for movements of the issue traffic that do not exceed the maximum reasonable R/VC ratios in **Table 1**. The variable cost of the issue movements was to be calculated for this purpose using the Uniform Railroad Costing System (URCS), with no adjustments, and with indexing as appropriate.[1] If there was a dispute over how to calculate variable costs, WFA was directed to bring that dispute to our attention.[2]

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[1] February '09 Decision at 31

[2] Id.

3. Present Dispute Over Compliance

On March 20, 2009, BNSF established rates for 2009 to comply with our February '09 Decision, which stated that the railroad could not charge rates that exceeded 240% of the variable costs of providing the transportation. (In our June '09 Decision the prescribed R/VC ratio was adjusted slightly to 241%.) BNSF therefore had to calculate the variable costs to transport coal from the 12 origin mines to the LRS plant at Moba Junction, WY. It used the most recent URCS data available (2007) and then followed well-established precedent to index those 2007 costs to the first quarter of 2009 with a combination of the Association of American Railroad (AAR) index and the Producer Price Index (PPI). BNSF notified the Board of its purported compliance with the February '09 Decision.

On April 2, 2009, WFA filed a reply to BNSF's notice, asserting that these rates did not comply with our order. WFA claimed that BNSF had failed to calculate the 2009 variable costs in accordance with our prior decision. Rather than use the actual variable costs (as reflected in the most recent URCS data), WFA maintained that BNSF was supposed to utilize the variable cost estimates used by the Board when it calculated the maximum markup levels. In this case, that would mean using 2004 URCS and a 2006 forecast of changes in rail cost (specifically the Board's Rail Cost Adjustment Factor adjusted for productivity, or RCAF-A). Because the 2007 actual variable costs were higher than the 2006 RCAF-A forecasts used in our prior decision, the practical effect of using the method advocated by WFA would be to yield significantly

lower transportation rates. Table 2 depicts the rates established by BNSF and those sought by WFA.

[Table 2 omitted.]

BNSF responded on April 15, 2009. It maintains that its rates comply with our order, and observes that WFA now seeks maximum lawful rates in 2009 that result in R/VC ratios dramatically lower than the 240% level prescribed in the February '09 Decision.

On April 21, 2009, WFA filed a motion to strike BNSF's entire pleading, claiming it was an improper "reply to reply." In the alternative, it sought permission to file a surreply that accompanied the motion to strike. BNSF filed in opposition to the motion to strike, stating that it must have a right to respond to the accusation raised by WFA for the first time in its pleading styled as a "reply." BNSF also objected to the surreply as duplicative of the earlier arguments.[3]

On May 28, 2009, WFA filed a letter with the Board and with numerous members of Congress complaining that BNSF is trying to deprive WFA of approximately one-third of the relief we forecasted in the February '09 Decision.

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[3] We will deny WFA's motion to strike, but grant its request to file the surreply. WFA has the obligation to bring the dispute over variable costs to our attention, see February '09 Decision at 31, so we cannot preclude BNSF from replying even though WFA labeled its pleading as a "reply." And while WFA's surreply is itself a reply-to-reply, we will permit the pleading as BNSF has not argued it is prejudiced by consideration of the legal or technical arguments raised therein.

DISCUSSION AND CONCLUSIONS

It is settled that in 2009 BNSF may charge WFA no more than 241% of the variable costs to transport coal from the 12 PRB mines to the LRM plant. But the parties cannot agree on how to calculate the variable costs for any particular movement in 2009. There is therefore a vast discrepancy between the prescribed rates advocated by each party.

WFA argues that the same approach used to calculate the variable costs for purposes of computing the maximum markups in the February '09 Decision should be used to calculate the rate prescription. Because the maximum markups were derived using 2004 URCS figures and the 2006 forecast of RCAF-A, WFA urges us to calculate the 2009 variable costs by using 2004 URCS figures and then indexing those 2004 variable costs to present dollars by using a 2006 forecast of RCAF-A. WFA would use this same approach for every subsequent year as well. So in 2024, the prescribed rates would still be derived by using URCS data from 2004 (a full two decades earlier) and a 2006 forecast of RCAF-A.

BNSF argues that the point of prescribing R/VC ratios (rather than specific rates) was to permit the maximum lawful rates to adjust automatically with changes in actual operating costs, whereas the approach advocated by WFA would fail to do so.

Table 3 shows the actual variable costs in the first quarter of 2009, the rates BNSF and WFA would have us prescribe, and the resulting R/VC ratios. As shown, neither party is proposing rates that comport with our prior decisions setting the maximum lawful R/VC ratio at 241% of variable cost.

[Table 3 omitted.]

WFA raises three core arguments for its position. First, WFA maintains that "the Board held in Major Issues that parties should use the same set of indexed base-year costs to calculate the maximum MMM R/VC ratios *and* the resulting prescribed maximum MMM rates."[4] WFA is incorrect. While we did adopt a method for indexing base year costs to calculate the maximum R/VC ratios, we then stated that the rate prescription "would be expressed as an R/VC ratio."[5] We further stated that, to calculate the prescribed R/VC ratio in each year of the SAC analysis period (here, 20 years), "the parties should project the initial (base-year) URCS variable costs forward, using the hybrid approach ... for projecting the SARR's operating expenses."[6] But we did not state, nor was it our intent, that the resulting maximum lawful rates be fixed in place using the same variable cost estimates needed to implement MMM.

By expressing the rate prescription as an R/VC ratio, our MMM methodology allows the rates per ton charged for the issue traffic to adjust over time as actual costs change. This was an innovation introduced in Major Issues to address, in part, the concern that rate prescriptions that will remain in effect for years must be made based on a time-bound record and forecasts of future events. Expressing the rate prescription as R/VC ratios rather than as predetermined rates provides a flexible rate

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[4] WFA Reply at 14 (emphasis added).

[5] Major Issues at 14.

[6] Id. at 14 n.19. In this case, we modified the forecasting approach used to calculate the maximum R/VC ratios, replacing the hybrid approach described in Major Issues with a forecast of RCAF-A.

prescription methodology that allows the actual rates charged for the issue traffic to yield the same contribution prescribed by the Board as costs change. Such flexibility is particularly important in this case where the rate prescription is to last for 20 years. Indeed, had we intended for the MMM approach to translate into fixed rates, without regard to actual variable costs, we could simply have specified the maximum rates per ton BNSF could charge, rather than describing the maximum lawful rates in terms of R/VC ratios.

WFA's second argument is that use of the actual variable costs will violate a fundamental SAC principle that traffic group revenues be reduced to equal the SAC requirements of the hypothetical SARR.[7] To illustrate, WFA uses an example of an issue movement from the Dry Fork mine. In calculating the maximum R/VC ratio for the first quarter of 2009, the MMM analysis forecast the maximum rate for the Dry Fork mine at $4.06 per ton. Substituting actual variable costs for the forecasts in the record at the time would raise the maximum rate level to $5.16 per ton. WFA maintains that this would result in a windfall for BNSF, as BNSF would be able to collect more than the SAC costs from the traffic group, and thus violate core SAC principles.

We reject WFA's premise that using actual variable costs (rather than forecasts from the record) to set the maximum lawful rate is improper or will provide a windfall to BNSF. Forecasts play a significant role in SAC cases. Our analysis relies heavily on forecasts of revenues, traffic flows, operating expenses, cost

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[7] See WFA Reply at 16.

indices, and cost-of-capital figures. In this case, those forecasts extended for 20 years, until the year 2024. To instruct BNSF on the maximum lawful rate it may charge until the year 2024, we must use those multiple, long-term forecasts to issue rate prescriptions. Rather than cast rates in stone, however, we decided in Major Issues to provide for more flexibility in our approach to rate prescriptions. Thus, we express rate limits as R/VC ratios, so that if operating expenses increase or decrease unexpectedly, as is the case here, the maximum lawful rates will respond automatically and immediately.

There is no basis on which to conclude that this approach will provide BNSF an expected windfall. In this case, operating expenses for 2009 are much higher than previously forecasted. Short of reopening the entire case and updating *all* the forecasts used therein, it is impossible to determine *a priori* what amount BNSF would be permitted to charge if a new SAC analysis were undertaken.[8] But we cannot be

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[8] WFA recalculated the MMM R/VC calculation for 2009 using actual variable costs (rather than the forecasts in our February '09 Decision) for all members of the traffic group. See WFA Surreply at 16-17. However, this calculation does not properly depict how the maximum R/VC ratios prescribed in our decision would change as a result of the higher than anticipated operating costs. To calculate the maximum lawful R/VC level for 2009, a critical input for the MMM approach is the 2009 SAC cost. This figure was $224 million as calculated in our February '09 Decision (Table 3 at 29). This $224 million figure reflects the total revenues that the hypothetical railroad would need to earn to recover its *forecasted* operating costs and earn a reasonable return on investment. The sharp increase in *actual* operating costs since the close of the record would increase the SAC costs above those forecasted in our decision. WFA, however, is only selectively updating our February '09 Decision and has kept constant the

constantly unraveling and reweaving our earlier work whenever actual events prove different from those previously forecasted. Thus, there is a need for flexibility in rate prescriptions so that they can be self-adjusting as operating expenses change, while continuing to provide a reasonable constraint on the pricing of the railroad.

We believe that the approach of setting the maximum R/VC ratios based on the best forecast of record—but then letting the actual maximum lawful rates adjust with changes in actual operating expenses—provides the appropriate balance of competing concerns. Consider for example what will happen in the year 2024. Under the approach adopted in Major Issues, the maximum lawful rate will be prescribed at 258% of variable costs, based on the record and forecasts in our original decision. If circumstances change, either party can seek to reopen that decision to have the maximum R/VC ratio changed. But the actual maximum lawful rate will depend on actual 2024 variable costs, not on URCS data from two decades earlier and a nearly two-decade old forecast of RCAF-A.[9]

2009 forecasted operating costs of the hypothetical railroad. (Nor has WFA updated the slew of other forecasts used to derive the 2009 SAC costs.) We conclude that the selective updating by WFA to recalculate new maximum R/VC ratios is inappropriate. We therefore disagree with WFA that, if we use actual variable costs to calculate the maximum lawful rates, all traffic group variable costs should be recalculated and the MMM model rerun. See WFA Surreply at 17.

[9] We also note that, under WFA's approach, the prescribed R/VC ratios in our decision would be pure fiction. They would not reflect the *actual* R/VC ratios the carrier may charge. The actual R/VC ratios the carrier could charge would be a secret shared

WFA's third argument is that using actual variable costs will deprive WFA of over 1/3 the value of the relief forecast by the Board. But any estimate of the total relief based on a 20-year prescription is necessarily speculative. This is a massive rate dispute with huge volumes of traffic over the 20-year period. Thus, even minor changes to the transportation costs will correspond to a change in the maximum lawful rate and cost one side or the other millions of dollars. In the February '09 Decision, we sought to provide the general public with an understanding of the magnitude of the dispute and the predicted relief. Our initial forecast of relief ($345 million over 20 years) was premised on forecasts of rail costs using the best information in the record at that time. Whether or not our initial forecast of the relief proves to be understated or overstated will only be known when the 20-year period nears completion. That initial forecast now appears overstated in light of actual market developments since the record closed. The drop is not attributable to any wrongdoing or improper conduct by BNSF, but to rising transportation costs. And as the carrier's operating costs have risen more than expected, so too must the prescribed rates rise or BNSF would not earn a reasonable return on the facilities used to serve WFA.[10]

Should actual future transportation costs fall below those forecast in our decision, WFA may receive more relief than we originally forecast. But in either event,

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only by the defendant carrier, the complainant, and their consultants and lawyers. This result is contrary to the need for transparency in our rate regulations to foster private negotiation and settlements.

[10] See BNSF Reply at 14.

the proper approach is to let the actual operating costs dictate the maximum lawful rates BNSF may charge WFA and thus the total amount of rate relief WFA ultimately receives. In short, WFA has not established a basis to depart from the approach adopted in Major Issues.

While we find BNSF's basic approach to calculating variable costs correct, the railroad has made some significant technical errors in its variable cost calculations. WFA correctly observed that BNSF has not applied the proper indexing approach to develop the variable costs for the first quarter of 2009. We have corrected that error, following our established indexing practice. We also use, as the best evidence of record, respectively, the total mileage submitted by BNSF (which properly includes loop miles) and its tons per car, but we rely on the number of cars submitted by WFA. Our variable cost calculations and the resulting maximum lawful rates are shown in **Table 4**.

[Table 4 omitted.]

We will make our workpapers available to BNSF and WFA upon request. BNSF is instructed to establish rates on a quarterly basis for the remainder of the rate prescription period, following the approach described in Oklahoma Gas & Elec. v. Union Pacific R.R., STB Docket No. 42111 (STB served July 24, 2009).

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WFA's motion to strike is denied and its motion to file surrebuttal is granted.

2. BNSF is instructed to reestablish, within 30 days, transportation rates that comport with this decision, and then update those rate prescriptions quarterly as new variable cost information and indices become available, following the methodology described in Oklahoma Gas & Elec. v. Union Pacific R.R.

3. This decision is effective on August 26, 2009.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 09-1092 *et al.* September Term 2009

Filed On: February 12, 2010

BNSF RAILWAY CO.,
Petitioner,
v.
SURFACE TRANSPORTATION BOARD,
Respondent.

Before: HENDERSON, ROGERS, and GARLAND, *Circuit Judges*.

ORDER

It is ORDERED on the court's own motion that the parties be prepared to address at oral argument on February 18, 2010 the following issues: (1) whether appellant BNSF Railway Company forfeited its objection to the Surface Transportation Board's failure to treat the shippers' complaints as automatically dismissed pursuant to 49 U.S.C. 11701(c) as of October 19, 2007 by waiting until July 14, 2008 to raise the objection, *see BNSF Ry. Co. v. STB*, 453 F.3d 473 (D.C. Cir. 2006); and (2) whether the Surface Transportation Board forfeited its right to rely on such forfeiture (if any) by failing to argue the issue on appeal, *cf. Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007); *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337, 344 (D.C. Cir. 2004) (citing *United States v. Layeni*, 90 F.3d 514, 522 (D.C. Cir. 1996)).

For the Court:
Mark J. Langer, Clerk

BY: Cheri W. Carter
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1092 September Term 2010

STB-42088

Filed On: September 2, 2010

BNSF Railway Company,
Petitioner

v.

Surface Transportation Board and United States of America,
Respondents

Basin Electric Power Cooperative, Inc. and Western Fuels Association, Inc.,
Intervenors

Consolidated with 09-1190, 09-1234

BEFORE: Henderson, Rogers, and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for panel rehearing filed on June 25, 2010, and the responses thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-1092 September Term 2010

STB-42088

Filed On: September 2, 2010

BNSF Railway Company,
Petitioner

v.

Surface Transportation Board and United States of America,
Respondents

Basin Electric Power Cooperative, Inc. and Western Fuels Association, Inc.,
Intervenors

Consolidated with 09-1190, 09-1234

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, the responses thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer,
Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

49 U.S.C. § 11701

TITLE 49. TRANSPORTATION
SUBTITLE IV. INTERSTATE TRANSPORTATION
PART A. RAIL
CHAPTER 117. ENFORCEMENT: INVESTIGATION, RIGHTS, AND REMEDIES

§ 11701. General authority

(a) Except as otherwise provided in this part, the Board may begin an investigation under this part only on complaint. If the Board finds that a rail carrier is violating this part, the Board shall take appropriate action to compel compliance with this part.

(b) A person, including a governmental authority, may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part. The complaint must state the facts that are the subject of the violation. The Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Board may not dismiss a complaint made against a rail carrier providing transportation subject to the jurisdiction of the Board under this part because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun.

49 C.F.R. § 1111.5

TITLE 49—TRANSPORTATION
SUBTITLE B—OTHER REGULATIONS RELATING TO TRANSPORTATION
CHAPTER X— SURFACE TRANSPORTATION BOARD, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER B—RULES OF PRACTICE
PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

§ 1111.5 Motions to dismiss or to make more definite.

An answer to a complaint or cross complaint may be accompanied by a motion to dismiss the complaint or cross complaint or a motion to make the complaint or cross complaint more definite. A motion to dismiss can be filed at anytime during a proceeding. A complainant or cross complainant may, within 10 days after an answer is filed, file a motion to make the answer more definite. Any motion to make more definite must specify the defects in the particular pleading and must describe fully the additional information or details thought to be necessary.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BNSF Railway Company, Petitioner, v. Surface Transportation Board, et al., Respondents.	No. 09-1092, et al.

Thursday, February 18, 2010

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

* * *

[9] JUDGE HENDERSON: And what authority is there for the re-opening authority extending the three-year deadline?

MR. BRESS: Well, in our view, Your Honor, a re-opening wouldn't extend the three-year deadline. In our view the case would be automatically dismissed as of October 19th, 2007 --

JUDGE HENDERSON: Right.

MR. BRESS: -- but they could re-open it with prospective effect. They addressed the ability to re-open matters with prospective --

JUDGE HENDERSON: I see what you mean.

MR. BRESS: -- effect --

JUDGE HENDERSON: I see. Okay.

MR. BRESS: -- in major issues itself. Now, even if we had been untimely, the Board's consideration of the issue on the merits, and their failure to raise untimeliness under the vast weight of judicial precedent, including in this Court, would say that the Board at that point would have forfeited any such claim. This Court hasn't addressed it in a wholesale way, but in Bowden v. United States, which is 106 F.3d 433, this Court so held in a case before it. I think the best discussion of this issue is actually in a Seventh Circuit case called Esther v. Principi, and that's 250 F.3d 1068, and that court head on looks at the question of do you treat a failure of an agency to raise something before it the same way [10] as you treat the failure of a party to 1 raise something in district court? In other words, you treat it as having been waived. And the court said yes, and it said because of a number of reasons, one is judicial economy, you want issues to have been flushed out before they get to this court; one is a lack of surprise to the parties when something is raised later; and one really relies on Chenery in the sense that you can't affirm the Board on a basis that the Board itself did not articulate, at least when it's not jurisdictional, and as this Court --

JUDGE ROGERS: So, your position is that the Board should have said not only does the three-year limit not apply, but even if it does you've waived the issue?

MR. BRESS: That's right. They should have said this has come to us untimely and we won't consider it.

JUDGE ROGERS: I mean, the difficulty about this whole waiver point it seems to me in part is the fact

that for more than 25 years the three-year limit hasn't been applied, whether that was lawful or not it just hasn't. But the Board at the ICC have made it clear what its interpretation was with regard to a complaint-based proceeding. So, you raise it initially by just saying it's not fair to go further than three years, then you raise it again later saying this case should be dismissed, and then alternatively you say look it, this is a re-opening going forward from 2007.

[11] MR. BRESS: That's right, Your Honor. But if they thought it was untimely they owed it to us to say so. I mean, we have to have the ability to understand --

JUDGE ROGERS: Well, they owed it --

MR. BRESS: -- what the rationale of the --

JUDGE ROGERS: Yes. But --

MR. BRESS: -- Board is in order to defend ourselves, because it may or may not be right if they say that it's untimely.

JUDGE ROGERS: But, I mean, the issue is preserved in the sense you raised it, and they said the three-year limit doesn't apply at all.

MR. BRESS: Well, the issue is preserved that they disagree with us on whether it applies.

JUDGE ROGERS: Yes.

MR. BRESS: But for them to fail to raise a timeliness argument really would be a bushwhack, and indeed, this Court in --

JUDGE ROGERS: How would that be a bushwhack?

MR. BRESS: Because --

JUDGE ROGERS: You, as Judge Henderson's been reviewing with you, you filed in July of '08 saying move to dismiss.

MR. BRESS: Because before this Court, Your Honor, we've had no ability to understand what argument they might [12] have with regard, this is moving to their failure now, to raise it before this Court. But if they raised it before they raised it in this Court we would be able to defend ourselves not only as we have over the past few days scouring the record to figure out what questions someone might come up with with regard to our filing, but we'd actually know what their opinion is, and their view is, and we'd be able to address it. And indeed, this Court in Southeast Alabama Medical, which two of Your Honors were on last fall, held that an agency's failure to raise a timeliness objection, so it's the same sort of thing, at the, I mean, before this Court waived or forfeit its ability to try to win on it. And it's interesting, what this Court said is it said that of course, a petitioner before an agency must raise an issue at an appropriate time, but the agency also must raise an issue before us, before this Court at an appropriate time, and the failure to do that meant that the issue was forfeit.

JUDGE ROGERS: Of course, the Court sua sponte is raising this, the agency wants to win on the merits saying that the three-year limit doesn't apply at all.

MR. BRESS: Well, Your Honor, that's true, the court did raise it sua sponte, but I'm not sure that that's a --

JUDGE ROGERS: I know. Yes.

MR. BRESS: -- distinction with a difference. I --

JUDGE ROGERS: All right.

* * *

185 (2)

No. 10-742

In the Supreme Court of the United States

BNSF RAILWAY COMPANY, PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that petitioner had forfeited its objection to the timeliness of the Surface Transportation Board's adjudication of a challenge to petitioner's rates.

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In the Supreme Court of the United States

No. 10-742

BNSF RAILWAY COMPANY, PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 604 F.3d 602. The final decision of the Surface Transportation Board (excerpted at Pet. App. 32a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010. A petition for rehearing and rehearing en banc was denied on September 2, 2010 (Pet. App. 57a-60a). The petition for a writ of certiorari was filed on December 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a railroad that transports coal for respondents Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively, WFA). Pet. App. 6a. From 1984 to 2004, the terms of the transportation were governed by a long-term contract, under which the price of shipment gradually decreased from $4 per ton to $3 per ton. *Ibid.* When the contract expired, petitioner and WFA were unable to reach a new agreement, and petitioner set a common-carrier rate of $6 per ton. *Ibid.* Although that was a relatively low shipping rate for coal, the profit margins for petitioner were quite high. *Ibid.*

2. a. On October 19, 2004, WFA filed a complaint against petitioner with the Surface Transportation Board (Board), alleging that petitioner's rates were unreasonable. Pet. App. 6a. The Board is the federal agency with economic regulatory jurisdiction over the freight rail industry. 49 U.S.C. 10501 (2006 & Supp. III 2009). One of the Board's responsibilities is to assure that a carrier charges reasonable rates for "market dominant" traffic, *i.e.*, traffic as to which the carrier faces no effective competition. 49 U.S.C. 10701(d)(1); 49 U.S.C. 10707(a) and (c). If the Board determines that such a rate is unreasonable, it may award damages to an injured shipper, 49 U.S.C. 11704(b), and it may prospectively prescribe a maximum lawful rate, 49 U.S.C. 10704(a)(1).

A subsection of the statute that sets forth the Board's "[g]eneral authority," 49 U.S.C. 11701(a), specifies that "[e]xcept as otherwise provided in this part, the Board may begin an investigation under this part only

by complaint." Although the proceeding between the WFA and petitioner was initiated by complaint, the Board is also empowered to begin various types of proceedings on its own initiative. See 49 U.S.C. 10502(b), 10706(d), 10745, 11123(b)(1), 11322(c).

The general-authority statute further states that a "formal investigative proceeding begun by the Board" under Section 11701(a) "is dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun." 49 U.S.C. 11701(c). The term "formal investigative proceeding begun by the Board" is not defined by statute, but the Board adheres to the interpretation of its predecessor agency, the Interstate Commerce Commission (ICC), of similar language in the ICC's governing statute as referring only to an investigation begun on the agency's own initiative. *Complaints Filed Pursuant to the Saving Provisions of the Staggers Rail Act of 1980 (Section 229, Public Law 94-448)*, 367 I.C.C. 406, 412 (1983); see C.A. App. 261-265. The ICC explained, among other things, that a contrary interpretation would "discourage settlements and encourage defendants to engage in dilatory tactics." 367 I.C.C. at 411.

b. In February 2006, shortly after the parties had submitted evidentiary presentations in the proceedings initiated on WFA's complaint, the Board ordered those proceedings—as well as similar proceedings against petitioner instituted by AEP Texas North Company (AEP Texas)—held in abeyance. Pet. App. 7a; C.A. App. 102-139. The Board explained that it was commencing a rulemaking to adjust the manner in which the reasonableness of rates like those at issue would be deter-

mined, and that it intended the new methodology to apply to pending cases. Pet. App. 7a; see *id.* at 5a. The Board informed the parties that they would be given an opportunity to submit supplemental evidence relevant to the new methodology after the rulemaking was complete. *Id.* at 7a.

WFA unsuccessfully objected to the continuance, arguing, among other things, that it would be prejudiced by delay. C.A. App. 144-152, 260. Petitioner argued that delay would not prejudice either WFA or AEP Texas. Pet. App. 10a; C.A. App. 261, 265.

In October 2006, the Board promulgated its new final rule. C.A. App. 177-254 (*Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1)). The Board directed the parties in both this case and the AEP Texas case to supplement the existing record with additional evidence necessary to apply the new methodology to WFA's and AEP Texas's existing substantive submissions. Pet. App. 7a; C.A. App. 255-259.

c. On September 7, 2007, after the record had been supplemented, the Board issued a decision concluding that petitioner "has market dominance over the transportation at issue," and was therefore required to charge reasonable rates, but that WFA had "failed to establish that the challenged rates [were] unreasonably high." Pet. App. 23a. The Board agreed with WFA, however, that the amendment to the governing rules in the midst of this case "clearly could have prejudiced WFA," which might have "offered a different case" had it anticipated the new standard that would be applied. *Id.* at 26a. The Board decided, in the interest of "fairness," to permit WFA the opportunity to revise relevant portions of its case to take account of the rule change.

Id. at 26a-27a. The Board directed the parties to "identify technical or substantive errors" in its September 7, 2007 decision in a timely motion for reconsideration. *Id.* at 31a n.28.

Petitioner filed such a reconsideration motion on October 22, 2007. C.A. App. 448-452. Although petitioner's filing observed that "over three years" had passed since WFA's initial complaint, *id.* at 452, petitioner did not suggest that the Board was required by statute to dismiss the proceeding. Pet. App. 16a. The Board denied petitioner's motion for reconsideration. *Ibid.* The Board noted in its order denying reconsideration that the parties had agreed to a procedural schedule for future filings in the case. *Ibid.*

d. Nearly nine months later, in its scheduled July 2008 response to WFA's new evidentiary submission, petitioner suggested for the first time that the proceeding should in fact have been dismissed on October 19, 2007, for failure to comply with the three-year deadline in 49 U.S.C. 11701(c). Pet. App. 9a. In its response, WFA disputed petitioner's construction of the statute. C.A. App. 576-578. WFA noted that the Board and the ICC had interpreted the three-year time limit not to apply to this sort of complaint-initiated proceeding, and it further argued that application of such a time limit would violate its due process rights. *Id.* at 578.

WFA also "emphasized that [petitioner] had not objected to the procedural schedules advancing the proceeding to July 2008" and had stated in previous filings that "delay caused by the rulemaking would not prejudice WFA's case." Pet. App. 10a. WFA observed that identical factors had led the Board to conclude that a similarly dilatory time-limit argument in the related

AEP Texas case (which also had been held in abeyance for the rulemaking) was barred by "basic equitable considerations." C.A. App. 578; see *id.* at 265.

In February 2009, the Board issued a final order finding for WFA on the merits of its complaint under the new methodology (with total relief estimated to be approximately $345 million), Pet. App. 32a-33a, and rejecting petitioner's argument that the Board had violated what petitioner asserted was a requirement in 49 U.S.C. 11701(c) that the proceeding be completed within three years, Pet. App. 35a-36a. On the latter issue, the Board reiterated its longstanding position that the three-year time limit in 49 U.S.C. 11701(c) applies only to proceedings initiated by the Board itself. Pet. App. 36a.

3. Petitioner sought judicial review of the Board's decision in the court of appeals. See 28 U.S.C. 2321(a). Petitioner argued, among other things, that 49 U.S.C. 11701(c) had required dismissal of WFA's complaint in October 2007. Pet. App. 11a. One week before oral argument, the court ordered the parties to be prepared to address (1) whether petitioner had forfeited any argument that the complaint should have been dismissed in October 2007 by waiting until July 2008 to raise that argument, and (2) whether the Board had forfeited its right to rely on such forfeiture by not arguing the forfeiture issue in the court of appeals. *Id.* at 55a. At oral argument, the Board took the position that petitioner had forfeited its Section 11701(c) argument and that the court of appeals could so hold.

The court of appeals held that the Section 11701(c) argument had not been timely raised by petitioner before the Board. Pet. App. 15a-17a. The court stated that "a reviewing court generally will not consider an

argument that was not raised before [the] agency 'at the time appropriate to its practice.'" *Id.* at 15a (quoting *BNSF Ry.* v. *STB*, 453 F.3d 473, 479 (D.C. Cir. 2006) (quoting *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952))). The court observed that petitioner in this case had waited three years and nine months to raise the Section 11701(c) argument, had passed up several opportunities to raise it earlier, and had not given a reasonable explanation for its delay. *Id.* at 15a-17a. The court additionally noted that although "a forfeiture can be forfeited" by failing to argue it on appeal to a court of appeals, precedent applying that rule was "inapplicable" here because the Board "never acquiesced in [petitioner's] view that section 11701(c)'s three-year limit applied to complaint-initiated investigations and rejected [petitioner's] argument on the merits when it was first raised in July 2008." *Id.* at 17a.

On the merits, the court of appeals remanded for the Board to address one specific substantive argument raised by petitioner. Pet. App. 22a. Petitioner's request for review was otherwise denied. *Ibid.*

ARGUMENT

This court of appeals' narrow, fact-bound decision does not warrant review by this Court. The panel concluded that, in the particular circumstances of this case, petitioner's conduct in Board proceedings failed timely to present its Section 11701(c) argument. Pet. App. 15a. The court observed, among other things, that petitioner: (1) had failed to raise the issue in seeking reconsideration of the Board's September 7, 2007 order permitting WFA to modify its submission in the case, even though the proceedings had already extended beyond three

years; (2) had waited until nine months after the expiration of the asserted three-year time limit to make the argument for the first time; and (3) had agreed to a procedural schedule with filing deadlines well past the three-year mark without raising a Section 11701(c) objection. *Id.* at 15a-16a. Contrary to petitioner's contentions (Pet. 12-26), the court of appeals' circumstance-specific conclusion does not conflict with either *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), or *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), or with any of the decisions petitioner cites from other courts of appeals.

1. Petitioner first contends (Pet. 12-13) that the disposition by the court of appeals is inconsistent with *Chenery*'s admonition that a court is "powerless to affirm . . . administrative action by substituting what it considers to be a more adequate or proper basis" for that action. Pet. 12 (quoting 332 U.S. at 196) (emphasis omitted). Petitioner's contention is misplaced, because "the *Chenery* doctrine is not applied inflexibly." *Fleshman* v. *West*, 138 F.3d 1429, 1433 (Fed. Cir.) (internal quotation marks omitted), cert. denied, 525 U.S. 947 (1998). As relevant here, it "does not require a remand to the agency if it is clear that the agency would have reached the same ultimate result had it considered the new ground." *Ibid.*; see *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969); accord, *e.g.*, *Sundor Brands, Inc.* v. *NLRB*, 168 F.3d 515, 519 (D.C. Cir. 1999); *Glissen* v. *United States Forest Serv.*, 138 F.3d 1181, 1183 (7th Cir.), cert. denied, 525 U.S. 1022 (1998).

The record in this case establishes that, had it reached the issue, the Board would have sustained WFA's objection to the timeliness of petitioner's Section

11701(c) argument. As WFA pointed out in its filing with the Board, the Board had already found the same argument by the same petitioner in identical circumstances in the related AEP Texas case to be untimely. C.A. App. 578. The Board had issued a single order holding in abeyance both this proceeding and the AEP Texas proceeding, *id.* at 102-139, and petitioner had asserted in response to that order that neither AEP Texas nor WFA would be prejudiced by delay. Pet. App. 10a; C.A. App. 265. When petitioner later raised a Section 11701(c) argument in the AEP Texas case, the Board concluded that the argument had been relinquished by petitioner's prior litigation conduct. C.A. App. 265. The Board explained that, "[h]aving represented to both this agency and AEP Texas that the extended schedule was acceptable, basic equitable considerations preclude [petitioner] from claiming that AEP Texas' complaint must now be terminated." *Ibid.*

The Board would have no reason for reaching a different conclusion in this case. Indeed, were the Board to treat this case differently from the AEP Texas case, WFA might well claim that such action was arbitrary and capricious.[1] Not only does this case involve precisely the same conduct by petitioner that the Board found inequitable in the AEP Texas case (a representation by petitioner that delay would cause no preju-

[1] Petitioner's argument (Pet. 22) that the Board's rules permit dismissal motions at any time provides no meaningful distinction between the cases, as those rules applied equally to the AEP Texas case. Moreover, petitioner here did not raise its Section 11701(c) argument in a motion to dismiss, see p. 5, *supra*, and the Board did not construe petitioner's Section 11701(c) argument as such a motion.

dice), but it involves additional inequitable conduct as well, including petitioner's failure to raise the Section 11701(c) argument within the time the Board identified for objecting in a motion for reconsideration to the September 7, 2007 order extending the case beyond three years, and petitioner's agreement to a procedural schedule that contemplated substantive filings after the three-year mark. See pp. 4-5, *supra*; Pet. App. 15a-17a, 31a n.28. Because, as discussed above, *Chenery* does not require a court to prolong proceedings when the ultimate conclusion is not in doubt, this case is not one in which a remand of the matter to the Board for further proceedings is required.[2]

2. Petitioner next contends (Pet. 21-24) that the decision below runs afoul of *Vermont Yankee* because it improperly imposed a judicially crafted rule on agency proceedings. The Court in *Vermont Yankee* reversed a decision in which the court of appeals had "struck down [an agency] rule because of the perceived inadequacies of the procedures employed in the rulemaking proceedings." 435 U.S. at 541; see *id.* at 525. The Court stated that "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 543.

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[2] Aside from erroneously suggesting (Pet. 23) that the Board silently addressed and rejected WFA's argument, petitioner offers no reason why the Board would be unable to consider that argument in the event of a remand.

The decision below does not conflict with *Vermont Yankee*. Unlike in *Vermont Yankee*, the court of appeals here neither invalidated agency action nor purported to prescribe new procedural rules for agency decision-making. Petitioner asserts that it is "plain" that "the Board itself believed the [Section 11701(c)] argument was timely," Pet. 23 (emphasis omitted), and criticizes the court of appeals for imposing a view contrary to the agency's. But for reasons just explained, the record demonstrates that the agency would *not* find the Section 11701(c) argument timely were it to address WFA's timeliness objection, because it had already reached that conclusion in the directly parallel AEP Texas case. See pp. 8-10, *supra*. And nothing in the court of appeals' decision constrains the Board's ability to formulate and apply its own timeliness rules in future cases.

3. Petitioner further contends (Pet. 13-20) that the result in this case conflicts with decisions in other circuits, citing a number of cases in ostensible support of the proposition that "a court may not refuse to address an argument challenging agency action based on administrative forfeiture when the agency itself did not find forfeiture and decided the argument on the merits." Pet. 16-20. Those cases differ materially from this one, and this case does not implicate any conflict among the circuits.

Most of the cases cited by petitioner involve the following fact pattern: An individual presents a procedurally defective claim against an agency to an internal component of that agency (*e.g.*, an agency employee presents an untimely discrimination claim to the agency's equal employment opportunity office). The agency rejects the claim on the merits, without mentioning the

procedural defect. The individual seeks judicial review against the agency (sometimes after further administrative review). The court holds that the agency, by denying the claim on the merits in its internal administrative proceedings, has given up its right in judicial proceedings to rely on the procedural defect. See *Hall* v. *Department of Treasury*, 264 F.3d 1050, 1060-1061 (Fed. Cir. 2001); *Ester* v. *Principi*, 250 F.3d 1068, 1071-1072 (7th Cir. 2001); *Jorge* v. *Department of Treasury*, 19 Fed. Appx. 892, 899 (Fed. Cir. 2001); *Labrada* v. *Department of Treasury*, 19 Fed. Appx. 883, 891 (Fed. Cir. 2001); cf. *Horton* v. *Potter*, 369 F.3d 906, 911 (6th Cir. 2004) (involving internal agency complaint); *Bruce* v. *United States Dep't of Justice*, 314 F.3d 71, 74 (2d Cir. 2002) (same); *Momah* v. *Dominguez*, 239 Fed. Appx. 114, 121 (6th Cir. 2007), cert. denied, 554 U.S. 902 (2008).

In those cases, unlike this one, the agency was an interested party that failed to raise an argument in its own defense. In this case, by contrast, the Board was a disinterested adjudicator in a dispute between private parties. One of those interested parties (WFA) raised the timeliness objection before the Board, relying on a directly parallel case in which the Board had found the same Section 11701(c) argument untimely, while also disputing petitioner's Section 11710(c) argument on the merits. The Board's decision to reject petitioner's argument on the merits, rather than addressing a procedural obstacle to that argument (timeliness), should not be held against the interested litigant (WFA), which properly raised both objections in the agency proceedings.

WFA's preservation of this issue similarly distinguishes this case from the remaining decisions on which

petitioner relies, which involve immigration proceedings. None of those cases cited by petitioner is comparable to this one. They all involved situations in which an alien failed to preserve an argument before the BIA; the BIA (generally) addressed the argument anyway; the alien was denied relief and sought judicial review; and the court of appeals held that it could review the BIA's resolution of the issue. *Lin* v. *Attorney Gen.*, 543 F.3d 114, 122-125 (3d Cir. 2008); *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1118-1222 (10th Cir. 2007); *Abebe* v. *Gonzales*, 432 F.3d 1037, 1040-1041 (9th Cir. 2005) (en banc); *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 670-671 (7th Cir. 2005). Those cases did not involve the situation here, in which a procedural objection was raised and preserved by a private litigant, and the adjudicating agency did not resolve the procedural objection because it decided the case in the private litigant's favor in any event on an alternate ground, which was also raised by the private litigant.

4. Petitioner's characterization (Pet. 26) of the decision below as "judicial intervention run riot" lacks merit. The circumstances of this case—in which the court of appeals essentially adopted a timeliness argument, preserved by a private litigant, that the agency itself had applied in an identical situation—are relatively unique.[3] In these circumstances, the court of appeals' decision

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[3] Petitioner briefly suggests (Pet. 23-24) that the decision below is not an isolated ruling by the court of appeals. But in support of that suggestion, it cites a single additional decision, *J.J. Cassone Bakery, Inc.* v. *NLRB*, 554 F. 3d 1041 (D.C. Cir. 2009). That case, in which the court of appeals declined to reach an argument that the agency itself did not address, see *id.* at 1043-1044, 1046, presents a different set of circumstances and was not cited in the decision below.

cannot be seen as disrespecting *Chenery*. The panel was well aware of *Chenery*, which petitioner had relied on at oral argument, Pet. App. 64a, and the panel cited *Chenery* elsewhere in its decision (in declining to adopt a substantive argument offered by WFA that the Board itself had not relied upon). *Id.* at 22a. And not a single judge on the court of appeals requested a vote on petitioner's request for en banc review, *id.* at 59a, suggesting that the panel's decision was properly understood by other judges on the court as resting on the unique circumstances of this case rather than the sort of significant departure that petitioner asserts.

Moreover, even if petitioner's Section 11701(c) argument were found to have been timely raised, petitioner would not be entitled to relief. The Board, adhering to its longstanding position, correctly held that Section 11701(c) did not require the automatic dismissal of the proceedings initiated by WFA, after they had been held in abeyance with petitioner's support during the rulemaking proceedings. Contrary to petitioner's contention, the three-year time limit in Section 11701(c) applies only to proceedings initiated by the Board itself. Section 11701(c) requires the termination within three years of any "formal investigative proceeding begun by the Board under" 49 U.S.C. 11701(a). The phrase "formal investigative proceeding"—which is not defined by statute—does not refer to investigations begun "on complaint," referred to in one clause of Section 11701(a), but rather to Board-initiated investigations "otherwise provided in this part," referred to in a separate clause of Section 11701(a). See 49 U.S.C. 11701(a) ("*Except as otherwise provided in this part*, the Board may begin an investigation *under this part* only on complaint.") (em-

phasis added); see 49 U.S.C. 10502(b), 10706(d), 10745, 11123(b)(1), 11322(c) (permitting Board to initiate proceedings in certain circumstances). The ICC had interpreted the phrase "formal investigative proceeding" in that way in the predecessor statutory provision when it enacted Section 11701(c), and Congress is presumed to have adopted that interpretation. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Congress, moreover, could not have intended that a private shipper's ability to obtain relief would depend upon the pace of agency proceedings, a factor largely beyond its control and subject to manipulation by a railroad, which might deliberately seek to extend the proceedings.

To the extent that the Court nevertheless believes that there is language in the court of appeals' opinion that could be read to extend beyond the particular circumstances of this case and possibly suggest a departure from administrative-law principles—or that the Court believes the opinion is not sufficiently clear—the Court could grant the petition, vacate the judgment, and remand for further proceedings. The court of appeals could then explain its reasoning further; remand to the Board to address WFA's timeliness objection in the first instance; or simply affirm the Board's conclusion that Section 11701(c) does not apply to proceedings that are initiated by complaint. Principles of judicial economy, however, suggest that the preferable course is simply to deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-742

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,
v.
SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA; BASIN ELECTRIC POWER COOPERATIVE, INC.; AND WESTERN FUELS ASSOCIATION, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS BASIN ELECTRIC POWER COOPERATIVE, INC. AND WESTERN FUELS ASSOCIATION, INC. IN OPPOSITION

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QUESTIONS PRESENTED

In 2004, BNSF exerted its monopoly power by attempting to unilaterally impose one of the largest rate increases in the history of American railroading on WFA's captive coal traffic. WFA, a non-profit cooperative, filed a rate complaint at the STB on October 19, 2004 and proceeded to expend over $8 million to prove its entitlement to rate relief. Not long before the Board's February 2009 decision that partially reduced BNSF's massive rate increase, BNSF argued for the first time that WFA's rate complaint case had been dismissed automatically on October 19, 2007 by operation of 49 U.S.C. § 11701(c), a statute that the agency and its predecessor had consistently construed for over 25 years as not applying in shipper-initiated rate cases. The Board rejected BNSF's Section 11701(c) objection in its February 2009 decision, but it did not address WFA's separate contention that BNSF had waived the objection by not presenting it in a fair or timely manner. The questions presented for review are:

1. Whether BNSF forfeited its objection to the STB's failure to treat the rate complaint brought by WFA as automatically dismissed pursuant to 49 U.S.C. § 11701(c) as of October 19, 2007 by waiting until July 14, 2008 to first raise the objection.

2. Whether the STB and WFA could rely on BNSF's forfeiture when (i) the Board never acquiesced in BNSF's Section 11701(c) objection, (ii) the Board rejected the objection at its first opportunity to do so, and (iii) the Board did not address whether BNSF had waived the objection, though requested to do so.

CORPORATE DISCLOSURE AND RULE 29.6 STATEMENT

Basin Electric Power Cooperative, Inc. ("Basin") is a North Dakota electric generation and transmission cooperative association. Basin has no corporate parent, and no publicly-held company has a 10% or greater ownership interest in Basin.

Western Fuels Association, Inc. ("WFA") is a Wyoming nonprofit corporation that supplies coal to its members. WFA has no corporate parent, and no publicly-held company has a 10% or greater ownership interest in WFA.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 604 F.3d 602. Pet.App.1a-22a. The three Surface Transportation Board ("STB" or "Board") decisions reviewed by the court of appeals are unreported and are available at 2009 WL 415499 (Decision served Feb. 18, 2009); 2009 WL 1567606 (Decision served June 5, 2009); and 2009 WL 2221011 (Decision served July 27, 2009). Portions of these decisions are reproduced at Pet.App.32a-54a.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010. The court of appeals denied petitions for rehearing on September 2, 2010. Pet.App.57a-60a. The petition for a writ of certiorari was filed on December 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

When it became clear some three and three-quarter years into a complex STB rate case that the Board was likely to roll back a portion of BNSF Railway Company's ("BNSF") proposed $1 billion rate increase on Western Fuels Association, Inc.'s ("WFA") coal traffic, BNSF argued for the first time that WFA's case was automatically dismissed seven months earlier under an obscure federal statute, 49 U.S.C. § 11701(c), that the STB had consistently

held had no application in rate cases initiated by shippers. The STB found BNSF's Section 11701(c) claims meritless, and, when BNSF sought review of this determination, the court of appeals held that BNSF had forfeited its statutory objection by not first raising it in a timely manner before the Board. In so holding, the court of appeals correctly applied settled law to the unique facts of this case, and its fact-bound finding of forfeiture does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

Background Facts and Proceedings Below

WFA is a non-profit cooperative that buys coal and coal transportation for its members. Basin Electric Power Cooperative, Inc. ("Basin") is a non-profit cooperative that generates and transmits electricity to 120 member rural electric systems, and is a member of WFA. Collectively, WFA and Basin are referred to as "WFA."

Along with five other non-profit and municipal entities, Basin owns and operates, and WFA provides and arranges for transportation of coal to, the Laramie River Station ("LRS"), a coal-fired electric generating station located near Wheatland, Wyoming. LRS supplies electricity to over 200 non-profit member cooperative, municipal, and public power systems that distribute the power to businesses, farmers, ranchers, and other consumers in nine Great Plains states. JA15-16, 43-45, 54.[1]

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[1] "JA__" refers to the Joint Appendix filed with the court of appeals.

LRS burns approximately eight million tons of coal annually, all of which originates from coal mines in the Wyoming Powder River Basin ("PRB") and is transported by BNSF from the PRB to LRS, a distance of approximately 200 miles. Pet.App.24a. BNSF exerts monopoly pricing power over the PRB-to-LRS service because rail service is the only viable transportation option and BNSF is the sole rail carrier serving LRS. *Id.* The freight rates WFA pays to BNSF are ultimately passed through to its rural consumers as part of their monthly electric bills. JA50.

Shortly after LRS went into commercial service, BNSF and WFA entered into a 20-year coal transportation contract for the PRB-to-LRS service. This contract was a very lucrative one for BNSF, as BNSF earned over $311 million in profits under it. JA46. Nevertheless, when the contract expired in September of 2004, BNSF unilaterally imposed massive rate increases on the LRS traffic under a common carrier tariff. WFA estimated that, left unchecked, payment of BNSF's tariff rates would increase its freight charges by $1 billion over the next 20 years (JA49) and produce rates with revenue-to-variable cost ratios starting at 481% and increasing over time to 843%. Pet.App.6a. The ultimate payor of these massive rate increases would be the customers served by LRS, who for the most part are small ranchers, farmers, households and businesses.

Left with no other option, WFA turned to the STB as its last line of defense against BNSF's monopoly pricing abuses. On October 19, 2004, WFA filed a complaint at the STB under 49 U.S.C. § 11701(b) alleging that BNSF exerted "market dominance" as defined in 49 U.S.C. § 10707 over the transportation of its coal from the PRB to LRS and that BNSF was exerting its dominant market power to impose rates that exceeded a reasonable maximum in violation of 49 U.S.C. § 10701(d)(1) and 49 U.S.C. § 10702(1). WFA requested that the Board accept its complaint, conduct a full hearing under 49 U.S.C. § 10704(a)(1), and at the conclusion of that hearing, exercise its authority under 49 U.S.C. §§ 11704(a)(1) and 11704(b) to prescribe maximum reasonable rates on the PRB-to-LRS service and to order BNSF to pay reparations to WFA equal to the unlawful payments WFA had made under BNSF's tariff while its complaint was being adjudicated by the Board. JA13-19.[2]

The Board accepted WFA's complaint and began conducting a full hearing under procedural schedules agreed upon by the parties and adopted by the Board. In the ensuing proceedings before the Board, BNSF conceded that it exerted market dominance over WFA's traffic, and WFA claimed it was entitled to substantial rate relief under the Board's "stand-alone cost" ("SAC") standard. JA312.

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[2] The case was docketed at the Board as Docket No. 42088, *Western Fuels Ass'n, Inc. and Basin Elec. Power Coop. v. BNSF Ry.*, STB Docket Nos. 42088 and 42088 (Sub-No. 1) ("*WFA*").

The SAC test was promulgated by the STB's predecessor, the Interstate Commerce Commission ("ICC"), in 1985, and thereafter applied and fleshed-out in a series of maximum rate cases at the ICC and, after the ICC was sunset in 1995, the STB. JA106. The SAC test sets the maximum rate that a hypothetical highly efficient, least-cost competitive carrier, operating in a contestable market with no barriers to entry, would charge to serve the issue traffic. JA183. The SAC test calls for the complainant shipper to model a hypothetical railroad, called a stand-alone railroad ("SARR"), that provides origin-to-destination service for the issue traffic (in the *WFA* case, from the PRB-to-LRS), and, at the complainant shipper's election, service to other customers in a traffic group, in a manner that maximizes revenues for the SARR and minimizes the SARR's costs. JA105-06.

Under the standards in effect when WFA filed its case in 2004, a shipper was entitled to rate relief if the revenues the SARR was projected to earn over a 20-year period exceeded, on a net present value basis, the costs of building and operating the SARR over the same period (including a reasonable return on investment). JA237. The amount of relief was determined by applying what the Board called its percent reduction method. For example, if SARR revenues exceeded SARR costs in a particular year by 20%, the challenged rate for that year would be reduced by 20%. JA185.

In early 2005, WFA used advanced computer modeling techniques to design a SARR that maximized revenues and minimized costs. In

calculating its SARR revenues, WFA relied on Board case law precedents, including the mileage-prorate procedures the Board had used in the last nine SAC cases to calculate revenues for "cross-over" SARR traffic – traffic that moves over the SARR but then is hypothetically interchanged with the defendant carrier for movement beyond the SARR. JA38. This calculation was critical because WFA developed a SARR where 96% of the SARR's traffic was cross-over traffic. JA307, 335.

WFA presented its SARR revenue and cost calculations in opening and rebuttal filings made in 2005. In these filings, WFA demonstrated it was entitled to substantial rate relief because its SARR's revenues exceeded SARR costs by approximately 45%. JA307. Final briefs were filed in December 2005, and the case was then ripe for decision by the Board. Pet.App.6a-7a. However, the Board did not decide the case. Instead, in February of 2006, it issued an order holding the *WFA* case "in abeyance" pending the Board's initiation and completion of a rulemaking proceeding, *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), 2006 WL 3087168 (STB served Oct. 30, 2006) ("*Major Issues Rulemaking*") where, among other things, the Board proposed to replace the mileage-prorate method to set cross-over traffic revenues with a new method, called Average Total Cost ("ATC"), and to retroactively apply ATC in the *WFA* case. JA102, 119. WFA immediately requested that the Board terminate the *Major Issues Rulemaking*, and decide its case on the closed administrative record. JA143-51. BNSF opposed WFA's request, arguing, *inter*

alia, that the delays caused by the rulemaking would not prejudice WFA. JA578. The Board denied WFA's request. JA161.

In the ensuing rulemaking proceeding, WFA repeatedly argued that it was unfair, and unlawful, for the Board to retroactively apply ATC in its case because WFA would have designed a different SARR using the ATC revenue allocation method. JA166, 171, 174. The Board had three responsive choices here – not apply ATC in the *WFA* case, apply ATC in the *WFA* case to the existing SARR, or apply ATC, but permit WFA to revise its SARR. Initially, the Board chose the second option. The Board adopted ATC in its final decision in the *Major Issues Rulemaking* served on October 30, 2006 (JA207-09), and one month later, in its decision reopening the *WFA* case, the Board directed the parties to recalculate SARR revenues using ATC as applied to the existing SARR (JA257).[3] WFA continued to object in the reopened *WFA* proceedings to the Board's retroactive application of ATC, asserting the same argument it had raised in the rulemaking proceeding – WFA would have designed a different SARR using ATC. JA287, 291, 295, 298.

In a decision served on September 10, 2007 ("*September 2007 Decision*"), the Board found that the retroactive application of ATC reduced WFA's initial calculation of SARR revenues using mileage-prorate method so much that its SARR revenues did not exceed its SARR costs. JA324. However, the

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[3] The Board had also ordered WFA and BNSF to submit additional supplemental SARR evidence during the pendency of the *Major Issues Rulemaking* using the existing SARR. JA 140.

Board also found that "the change from [mileage prorate] to ATC would affect the basic design of a SAC case" (Pet.App.30a) and that WFA had not had a "fair" opportunity to present its case since the Board had not permitted WFA to revise its SARR (Pet.App.26a, 30a). The Board then ruled that if WFA elected to do so, the Board would keep the record open to permit WFA to revise its SARR. Pet.App.31a. Finally, the Board ruled that the parties should raise all objections to the Board's decision in petitions for reconsideration. Pet.App.31a n.28.[4]

BNSF filed a petition for reconsideration. In that petition, BNSF objected to the Board's decision to permit WFA to revise its SARR. BNSF also argued it was "unfair" to extend the case, but did not argue that the Board lacked jurisdiction to do so. JA446, Pet.App.16a. The Board denied BNSF's petition for reconsideration; WFA informed the Board that it would submit a revised SARR; and the parties agreed on a procedural schedule for submission of revised SARR evidence. JA475, 478. In accordance with that schedule, WFA presented its revised SARR, and supporting evidence, on May 13,

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[4] The Board also relied on its *September 2007 Decision* in judicial review proceedings brought by WFA in the court of appeals challenging the Board's decision in the *Major Issues Rulemaking* to retroactively apply ATC in *WFA*. The court of appeals held that the Board could retroactively apply ATC in the pending *WFA* case, so long as WFA was given a fair opportunity to present conforming evidence, and noted that the Board had given WFA this opportunity in its *September 2007 Decision*. *See BNSF Ry. v. STB*, 526 F.3d 770, 784 (D.C. Cir. 2008).

2008. JA491. This evidence showed that the revised SARR's revenues substantially exceeded the revised SARR's costs, and that WFA was entitled to substantial rate relief under the Maximum Markup Methodology ("MMM") the Board had adopted in its *Major Issues Rulemaking* rulemaking proceeding to replace the percent reduction method. JA494. Under MMM, SARR relief is allocated using demand elasticity principles among qualifying members of the SARR traffic group. JA189.

BNSF responded to WFA's revised SARR evidence in a reply filed with the Board on July 14, 2008. In that filing, BNSF argued for the first time that WFA's case was automatically dismissed on October 19, 2007 by operation of law under 49 U.S.C. § 11701(c) – three years to the day after WFA's complaint was filed. Pet.App.9a, JA532-35. In its rebuttal, filed with the Board on August 15, 2008, WFA presented three responsive arguments to BNSF's automatic dismissal contentions. First, WFA argued that the Board, and the ICC, had consistently and correctly construed the automatic dismissal rule set forth in Section 11701(c) as not applying in shipper-initiated maximum rate cases, citing *inter alia*, *AEP Texas North Co. v. BNSF Railway Co.*, STB Docket No. 41191 (Sub-No. 1), 2006 WL 3290425 at *2 (STB served Nov. 13, 2006) ("*AEP Texas*") (JA261-65) (Section 11701(c) applies "only to investigations begun by the agency on its own initiative . . . not those begun on complaint"); *Complaints Filed Pursuant to the Savings Provisions of the Staggers Rail Act of 1980*, 367 I.C.C. 406, 407-12 (1983) ("*1983 Interpretation*") (same). JA576.

Second, WFA argued that if the three-year dismissal rule applied, its application impermissibly deprived WFA of due process of law because WFA was not accorded a fair hearing, nor a final decision, before October 19, 2007, due to agency delays it did not cause, citing, *inter alia*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) ("*Logan*") (automatic statutory dismissal of a party's cause of action before it is heard and decided by an agency, due to no fault of the party, violates due process). JA577. Finally, WFA argued that BNSF had waived its automatic dismissal arguments by not raising them in a fair or timely manner before the Board, citing, *AEP Texas*, 2006 WL 3290425 at *5 (Board finds that BNSF "waived" its Section 11701(c) automatic dismissal contentions first raised 16 days prior to the putative three-year dismissal date). JA578.

In a series of three decisions served in 2009, the Board found that the revised SARR's revenues exceeded the revised SARR's costs and that WFA was entitled to rate relief under the Board's new MMM standards. JA614, 643, 671, 674. The Board prescribed maximum reasonable rates and awarded WFA approximately $120 million in reparations. JA685. While affording substantial rate relief to WFA, the rates prescribed by the Board were substantially higher than the expiring contract rates, and produced revenue-to-variable cost ratios in the 250% range. JA675. Rates at these levels permit BNSF to continue to earn very high profits on the LRS coal movement. JA675.

The Board also addressed and rejected BNSF's automatic dismissal claims in the first of its 2009 rate decisions, served on February 18, 2009. JA610. In that decision, the Board concluded, consistent with 25 years of Board/ICC precedent, that the three-year automatic case dismissal rule set forth in Section 11701(c) does not apply to rate complaint cases initiated by shippers. JA621. Finally, the Board reaffirmed its prior ruling that due process required the Board to provide WFA the opportunity to revise its SARR. JA615.

BNSF filed petitions for review of the Board's three 2009 rate orders in the court of appeals. In these petitions, BNSF challenged many of the Board's SAC rulings and argued, as it had before the Board, that WFA's rate case was automatically dismissed under Section 11701(c) on October 19, 2007. Pet.App.2a. Prior to oral argument, the court of appeals asked the Board to address two issues at oral argument: (1) whether BNSF forfeited its Section 11701(c) contentions by waiting until July 14, 2008 to first raise them and (2) whether the Board had forfeited this argument by failing to raise it in its brief. Pet.App.55a.

The STB, joined by WFA, argued that BNSF had forfeited its Section 11701(c) contentions by not raising them in a timely manner before the Board and that the STB had not forfeited these contentions by not raising them in its brief. Transcript of Oral Argument ("Oral Arg. Tr.") at 34-37, 48, ECF No. 1245411; Pet.App.11a. The court of appeals panel, comprised of Circuit Judges Henderson, Rogers, and Garland, agreed. In a unanimous opinion, the court

of appeals held that resolution of the question of whether BNSF had forfeited its Section 11701(c) objection was governed by the longstanding rule adopted by this Court over 50 years ago in *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("*Tucker Truck*"), and consistently followed thereafter, that "[a] reviewing court generally will not consider an argument that was not raised before the agency at the time appropriate under its practice." Pet.App.15a (internal quotation omitted). The court of appeals found that by waiting some nine months after the putative three-year dismissal date to first raise the dismissal argument, BNSF had "forfeited the statutory argument by failing to raise it in a timely manner before the Board" (Pet.App.2a), just as BNSF had three years earlier in *BNSF Railway Co. v. STB*, 453 F.3d 473 (D.C. Cir. 2006) ("*Xcel*"). In *Xcel*, the court held that BNSF forfeited an identical Section 11701(c) dismissal contention in a coal rate case by waiting until six months after the putative three-year statutory deadline before first raising the contention at the STB. Pet.App.15a-17a.

The court of appeals also found that the Board had not forfeited its right to rely on BNSF's forfeiture because the Board "had never acquiesced in BNSF's view" that WFA's rate case was automatically dismissed on October 19, 2007 and had "rejected BNSF's argument on the merits when it was first raised in July 2008." *Id.* at 17.

In light of its forfeiture rulings, the court of appeals did not resolve the merits of BNSF's Section 11701(c) claims, but did set forth the parties' positions on the statutory and constitutional issues

raised, including the arguments made by WFA and the STB that dismissal of WFA's rate case on October 19, 2007 would have violated WFA's basic due process rights to a fair hearing and final merits decision. Pet.App.11a-14a. While not deciding these issues, the Court observed that "[t]he Board's concern with due process may be well founded." Pet.App.14a (internal quotation omitted) (citing *Logan*).

After finding BNSF's automatic dismissal arguments forfeit, the court of appeals rejected all of BNSF's SAC contentions, except one involving the Board's ATC methodology. The court remanded without vacating the Board's decision for the Board to address this contention. Pet.App.18a-22a. BNSF petitioned for panel and en banc rehearing. These petitions were denied on September 2, 2010. Pet.App.57a-59a.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

BNSF asks this Court to review the court of appeals' finding that BNSF forfeited its Section 11701(c) automatic dismissal contentions by not presenting them in a timely manner to the STB. In making this request, BNSF concedes that under the settled *Tucker Truck* rule, the court of appeals could find BNSF's Section 11701(c) objection forfeit if the argument was not raised in a timely manner before the STB, but argues that the court of appeals erred in applying the *Tucker Truck* standard in this case. This Court rarely grants a petition for a writ of

certiorari when the asserted error consists of the misapplication of settled law and, in any event, the court of appeals correctly found, as the STB had requested, that BNSF's Section 11701(c) contentions were not timely raised before the Board.

Alternatively, BNSF seeks review on grounds that the court of appeals erred in not finding BNSF's forfeiture excused because the Board rejected BNSF's Section 11701(c) contentions solely on the merits without also addressing whether the contentions were timely raised. The court of appeals properly exercised its discretion in rejecting this contention. BNSF points to some disagreement among the courts of appeals concerning the resolution of forfeiture-of-forfeiture issues arising in cases involving federal employment discrimination claims and immigration law claims, but BNSF has not shown that any court of appeals would have decided this case differently. Nor is this case an appropriate vehicle to consider forfeiture-of-forfeiture issues arising in federal employment discrimination cases or in immigration cases, as the resolution of these issues turns on the intricacies of federal employment and immigration law not present in this case.

Finally, BNSF asserts that review is necessary because the forfeiture issues it raises, along with the merits of its forfeited statutory objection, raise important and recurring issues. In fact, the forfeiture issues BNSF raises have arisen in only two cases involving review of STB orders, and, as discussed above, the two courts of appeals rejected the forfeiture rule BNSF asks this Court to

adopt. Similarly, the STB has consistently held that the three-year automatic dismissal rule set forth in Section 11701(c) does not apply in shipper-initiated maximum rate cases, and this longstanding construction has been challenged in recent years by only one carrier, BNSF, and then only unsuccessfully in the form of a gimmick, sandbagged defense raised in three on-going STB rate cases either long after, or just before, the asserted three- year automatic dismissal date, in a transparent effort to deprive the complainant shippers of their due process rights to a fair and final decision on the merits of their complaints.

I. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW IN FINDING BNSF FORFEITED ITS SECTION 11701(c) AUTOMATIC DISMISSAL CONTENTIONS

The court of appeals determined that BNSF's Section 11701(c) objection was forfeit by applying the longstanding and settled principle, first adopted by this Court in its 1952 decision in *Tucker Truck*, and consistently adhered to thereafter, that "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.*, 344 U.S. at 37. "On this underlying principle of administrative law, the Court is

unanimous." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quotation marks and citation omitted).

BNSF concedes that *Tucker Truck* sets forth the correct legal standards for adjudicating whether it forfeited its Section 11701(c) automatic dismissal objection (Pet.9, 21) and further concedes that *Tucker Truck* sets forth principles that have "long been settled" (Pet.21), but argues that the Court should grant certiorari because the court of appeals failed to properly apply the *Tucker Truck* standards to the facts in this case. This Court "rarely" grants certiorari petitions "when the asserted error consists of . . . misapplication of a properly stated rule of law" (Sup.Ct.R. 10) and, in any event, the court of appeals did correctly apply the *Tucker Truck* standards in this case.

1. BNSF argues that the court of appeals misapplied *Tucker Truck* because BNSF did submit its automatic dismissal contentions in a timely manner to the STB. BNSF cites the STB procedural rule stating that "[a] motion to dismiss can be filed at anytime during a proceeding" (49 C.F.R. § 1111.5) and asserts that it complied with this rule by first submitting its automatic dismissal contentions in the form of an argument submitted in its July 14, 2008 reply filing. Pet.22-23.

As BNSF has conceded, it "didn't file a motion to dismiss" with the Board (Oral Arg. Tr. 7), so the only significance of the cited dismissal rule is that BNSF did not invoke it in the STB proceedings. Moreover, even assuming, as BNSF contends, the argument it presented in its July 2008 reply was "effectively" a motion to dismiss (*id.*), the fact that a

party can present a dismissal request at any time does not mean that the grounds cited in the request are timely raised.

The court of appeals' decision in *Xcel* demonstrates this point. In that case, Xcel filed a maximum rate complaint at the STB in December 2000. *Id.*, 453 F.3d at 477. Some three and one-half years later, the Board issued a decision in June 2004 awarding rate relief to Xcel. *Id.* BNSF then filed a timely petition for reconsideration where it argued for the first time that Xcel was entitled to no rate relief because, under Section 11701(c), Xcel's case was automatically dismissed in December 2003. *Id.* at 479. The STB did not address BNSF's Section 11701(c) contentions in its reconsideration decision, and BNSF repeated the argument on review. *Id.* at 478-79. The court of appeals held that BNSF's Section 11710(c) objection was forfeit under *Tucker Truck* because it had not been raised in a timely manner before the Board. *Id.* at 479. Thus, in *Xcel*, BNSF filed a timely petition for reconsideration that contained an untimely dismissal request.

Similarly, in another maximum rate case, *AEP Texas*, BNSF filed a notice at the STB on July 25, 2006 claiming that the case, which was far from being completed, was going be automatically dismissed 16 days later on August 10, 2006 under Section 11701(c) as that date marked the three-year anniversary of the date of the filing of the shipper's complaint. The Board accepted BNSF's notice, but held, *inter alia*, that BNSF had waived its automatic dismissal request by presenting it in an unfair and untimely manner. JA260. As in *Xcel*, BNSF's filing

was not out of time, but BNSF's request for dismissal under Section 11701(c) contained in the filing was found untimely.

2. BNSF's Section 11701(c) contentions were clearly raised in an untimely manner in *WFA*. SAC cases are extraordinarily complicated. The timing of the submission of evidence and argument in SAC cases is governed by Board-prescribed procedural schedules. *See, e.g.*, 49 C.F.R. § 1111.8 (setting forth the governing procedural schedules in SAC cases "[a]bsent a specific order by the Board"); *General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases*, STB Ex Parte No. 347 (Sub-No. 3), 2001 WL 240000 (STB served Mar. 12, 2001) (adopting procedural guidelines to apply in SAC cases) ("*General Procedures*"). As pertinent here, the STB held in its *September 2007 Decision* that if WFA elected to revise its SARR, the Board would reopen the record for the limited purpose of permitting WFA to submit supplemental revised SARR evidence, and for BNSF to respond to this revised SARR evidence, but expressly directed the parties not to litigate any "unrelated issues." JA325. The Board's *September 2007 Decision* also contained a "specific order" (see 49 C.F.R. § 1111.8) to govern the timing of any challenges to the Board's supplemental evidence ruling: all "technical or substantive" errors in the Board's decision were to be presented to the Board in the form of a petition for reconsideration to be filed by October 1, 2007 (Pet.App.31a. n.28), a date the Board later extended to October 22, 2007.

BNSF was aware that if WFA elected to submit supplemental evidence, the proceeding would

extend beyond the putative automatic dismissal date of October 19, 2007, but, as it conceded, BNSF did not raise its automatic dismissal contentions in its petition for reconsideration, which it submitted to the Board on October 22, 2007, but instead waited for ten months after the *September 2007 Decision* before first raising them on July 14, 2008 (Pet.App.16a). BNSF's dismissal claims were thus clearly untimely under the governing procedural schedule crafted by the Board for application in *WFA*. When asked by the court of appeals why it did not present its Section 11701(c) contentions in its October 22, 2007 reconsideration petition, BNSF claimed that it thought the *September 2007 Decision* was a final decision denying all rate relief to WFA. The court of appeals found this excuse did not "negate the forfeiture" because "[t]he September 2007 Decision indicated on its face it was not a final decision." Pet.App.16a.

Moreover, the Board has developed, through case-by-case adjudication, additional procedural rules governing the timing and manner that SAC arguments can be presented to the Board, including rules that preclude parties from sandbagging – *i.e.*, presenting evidence or arguments that "could and should" have been presented at an earlier stage in the proceedings. *General Procedures*, 2001 WL 240000 at *3; *accord Tex. Mun. Power Agency v. Burlington N. & Santa Fe. Ry.*, STB Docket No. 42056, 2004 WL 2619767 at *3 (STB served Sept. 27, 2004) (rejecting argument that "could have and should have been presented in the earlier stages of the proceeding"). And, prior to the decision below,

both the STB and the court of appeals had specifically found that BNSF's sandbagging of its Section 11701(c) automatic dismissal contentions was not permissible in a SAC case.

In *AEP Texas*, the STB held that BNSF "waived" its Section 11701(c) objection, raised 16 days prior to the putative three-year dismissal date, "through its course of conduct in this case" including agreeing to an "extended schedule" for the receipt of evidence beyond the asserted three- year dismissal date. *Id.*, 2006 WL 3290425 at *5. JA265. Similarly, in *Xcel*, the court of appeals held that BNSF forfeited its Section 11701(c) objection, raised six months after the putative three-year dismissal date, and after the Board had awarded some rate relief to the complainant shipper, because BNSF "could have and should have" raised the argument earlier in the proceedings and because any failure on the part of the Board to decide the case within three years "was induced by BNSF's own failure to raise the argument in good time." *Id.*, 453 F.3d at 479 (internal quotation omitted).

The court of appeals determined that BNSF had engaged in the same types of sandbagging tactics in *WFA* that led to the court's finding of forfeiture in *Xcel*: BNSF waited until long after the putative statutory deadline expired before raising its automatic dismissal contentions; BNSF did not raise the contentions until it was clear the Board was going to afford the complainant shipper some rate relief; and, prior to invoking the dismissal claim, BNSF gave no indication in the STB proceedings that it was going to raise the defense, despite having

multiple opportunities to do so. Pet.App.16a-17a. Finding a forfeiture on these facts was clearly the correct result and one that fully comports with SAC standards precluding sandbagging.

3. The court of appeals' ruling on BNSF's forfeiture also advances the policy objectives underlying the *Tucker Truck* decision. In that case, a party to an ICC proceeding possessed a procedural objection – the hearing examiner that initially heard the case had not been appointed in the manner required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. ("APA") – but first raised the objection in a court following its loss on the merits at the ICC despite having "many opportunities during the administrative proceeding" to raise the issue. *Tucker Truck*, 344 U.S. at 35. The district court set aside the ICC's order based on the belatedly raised APA argument. In reversing the district court's decision, this Court emphasized that one of the principal policy reasons for requiring parties to timely raise procedural arguments at the ICC was to give the ICC a chance to cure the procedural defect prior to ruling on the merits, thus lessening the need for judicial review of procedural challenges to agency action. *See id.* at 37 ("orderly procedure and good administration require that objections to proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts"). The Court further held that this policy applied even in cases where the ICC "had a predetermined policy" on the procedural challenge because the agency might decide to change the policy. *Id.*

In this case, the STB has long held that the three-year automatic dismissal rule set forth in Section 11701(c) does not apply to shipper-initiated rate complaint cases. Pet.App.36a. If a party like BNSF wants to challenge the application of that construction in a particular case, *Tucker Truck* instructs that the objection be made when the agency has an "opportunity for correction." *Id.* at 37. That policy cannot be achieved where, as here, BNSF waits until long after the asserted statutory deadline has expired before asserting the statutory defense. Moreover, the Court also emphasized in *Tucker Truck* that the untimely procedural objection raised in that case was made "clearly [as] an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice." *Id.* at 36. BNSF's Section 11701(c) objection, like the objection at issue in *Tucker Truck*, was similarly brought forward as an "afterthought . . . at the last possible moment" in a transparent effort to strip WFA of its rate relief, and the court of appeals' decision finding BNSF's objection forfeit advances "considerations of practical justice." *Id.*

4. BNSF contends that the court of appeals' forfeiture decision conflicts with this Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) ("*Vermont Yankee*"). Pet.21-24. In *Vermont Yankee*, the court of appeals overturned an agency rulemaking decision "because of the perceived

inadequacies of the procedures employed in the rulemaking proceedings." *Id.* at 541. This Court reversed, holding that the rulemaking procedures employed by the agency conformed to requirements set forth in the APA, and that the court of appeals was not free to dictate different procedures than those set forth in the APA. *Id.* at 548-49. "*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *Pension Benefit Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990).

The court of appeals' decision does not conflict with *Vermont Yankee*. First, the court of appeals did not address, much less find, that the procedures used by the STB in the *WFA* case were deficient. Second, the court of appeals did not remand the case for the STB to employ new procedures. Third, this case does not involve a dispute between the court and the agency over agency procedural practice. The STB urged the court of appeals to find that BNSF had failed to raise its automatic dismissal contentions in a timely manner before the Board and the court of appeals agreed. Fourth, the result reached by the court of appeals fully complies with governing STB procedural rules and decisions.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT WFA AND THE BOARD DID NOT FORFEIT THEIR RIGHT TO ARGUE THAT BNSF FORFEITED ITS SECTION 11701(c) CONTENTIONS

Alternatively, BNSF argues that even if it failed to raise its Section 11701(c) automatic dismissal contentions in a timely manner before the Board, the court of appeals should have found that the Board, and WFA, forfeited their right to argue BNSF's forfeiture. Pet.12-20. BNSF's "forfeiture-of-forfeiture" contentions raise no issues that merit review by this Court.

1. Resolution of the issue whether a party forfeits an appellate forfeiture defense is committed to the sound discretion of the appellate court. Pet.App.17a. The court of appeals properly exercised its discretion in holding that the STB and WFA did not forfeit their right to argue BNSF's forfeiture in this case.

The court of appeals ruled that the STB and WFA did not forfeit their forfeiture defense because the Board "never acquiesced in BNSF's view" that Section 11701(c) applied in shipper-initiated rate cases and had "rejected BNSF's argument on the merits when it was first raised in July 2008." Pet.App.17a. BNSF does not dispute these findings, nor does BNSF point to any record evidence where WFA, or the Board, agreed to waive any defenses to BNSF's Section 11701(c) contentions, including a defense based on the *Tucker Truck* forfeiture rule.

2. BNSF argues that the court of appeals should have found that WFA and the Board forfeited, *sub silentio*, their right to rely on BNSF's forfeiture because the Board rejected BNSF's Section 11701(c) automatic dismissal contentions as meritless without addressing whether the contentions were raised in a timely or otherwise impermissible manner, and asks this court to grant certiorari to address a purported conflict in the circuits related to the resolution of this issue. Pet.12-20. However, the conflict here is one manufactured by BNSF.

The STB is a regulatory agency that administers the transportation laws generally codified at 49 U.S.C. § 10101 *et seq*. In the administration of these laws, the Board principally serves as an impartial judge resolving disputes between shippers and rail carriers concerning rail rates, practices and other matters Congress has directed the Board to regulate. Since the agency's creation in 1996, the issue whether the STB waives an appellate forfeiture argument by deciding the merits of the forfeited argument has arisen in only one other case involving the STB, *Otter Tail Power Co. v. STB*, 484 F.3d 958 (8th Cir. 2007) ("*Otter Tail*"). As BNSF acknowledges (Pet.16), the Eighth Circuit held in *Otter Tail* that the STB did not forfeit the appellate argument.

In *Otter Tail*, the complainant shipper asked the Board to overturn a SAC "cross-subsidy" standard the Board had adopted in another SAC case. *Id.*, 484 F.3d at 963. The Board rejected the shipper's argument on the merits without addressing

whether it had been properly raised before the agency, and the shipper petitioned for review, *inter alia*, of the Board's ruling on the cross-subsidy issue. On review, the STB argued that the shipper had forfeited the cross-subsidy argument because the shipper had not presented the argument in a timely manner to the Board. The Eighth Circuit agreed. *Id.* In so holding, the Eighth Circuit did not find that the STB had "forfeited" its appellate forfeiture argument by deciding the merits of the shipper's cross-subsidy argument.

The results reached by both the D.C. Circuit and the Eighth Circuit reflect proper application of forfeiture principles in STB rate cases litigated under the Board's SAC test. SAC cases call upon the Board to resolve hundreds of disputed issues of fact and law on records that are mind-bogglingly immense. In WFA's case, the record consisted of over 12,000 pages of hard-copy evidence, argument, workpapers, and supporting data, along with over 30 gigabytes of electronic spreadsheets, workpapers and supporting data. In resolving this multitude of issues, the STB can easily decide one or more issues on the merits, while inadvertently overlooking a threshold question of whether the issue has been properly presented. In the instant case, WFA argued in the STB proceedings that the Board should not reach the merits of BNSF's automatic dismissal contentions because BNSF had failed to raise them in a fair and timely manner. JA578. The Board appears to have inadvertently overlooked this contention, and did not address it in its merits decisions, but the Board's failure should not preclude

a reviewing court from reaching the timeliness issue, particularly where, as here, the STB agrees that BNSF's Section 11701(c) automatic dismissal contentions were not presented in a timely manner before the Board, and requests a finding of appellate forfeiture.

3. In the absence of any conflicting courts of appeals' decisions concerning forfeiture rulings in cases involving the STB, BNSF attempts to manufacture a pertinent "conflict" by citing waiver rulings in cases involving principally federal employment discrimination claims and federal immigration law claims. Pet.15-20. The courts of appeals have taken at least four different approaches in resolving the issue of whether a federal agency that has issued a final decision denying the merits of an untimely raised employment discrimination claim, without addressing the timeliness of the claim, waives a timeliness defense after the claimant brings suit in federal district court. *See Boyd v. United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985) ("*Boyd*") (agency waives defense if it makes an administrative "finding of discrimination"); *Rowe v. Sullivan*, 967 F.2d 186, 191 (5th Cir. 1992) (agency waives defense only if it "make[s] a specific finding that the claimant's submission was timely"); *Marquardt v. Leavitt,* 294 Fed. Appx. 112 (5th Cir. 2008), *cert. denied sub nom. Marquardt v. Sebelius*, 130 S. Ct. 361 (2009) ("*Marquardt*") (same); *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) (agency waiver turns on a case-by-case "balancing of

equities"); *Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir. 2001) (agency waives defense).

In *Marquardt*, the United States argued that the position attributed to the 9th Circuit in *Boyd* – *i.e.*, a waiver exists only if the agency makes a specific finding of discrimination – was the correct legal standard. *See* Brief for the Respondent in Opposition at 8 (No. 08-1048). Clearly, the instant case is not the appropriate vehicle to address and resolve the proper waiver standards to apply in employment discrimination cases. WFA also points out that the Court recently declined the opportunity to address employment case waiver issues by denying the petition for a writ of certiorari in *Marquart*. *Id.*, 130 S. Ct. 361.

Similarly, the courts of appeals have differed in their response to the question of whether a Board of Immigration Appeals ("BIA") decision rejecting on the merits a claim not properly presented to it by an alien in a removal proceeding is subject to judicial review under 8 U.S.C. § 1252(d)(1) ("court may review final order of removal only if . . . the alien has exhausted all administrative remedies"). *See, e.g.*, *Amaya-Artunduaga v. Att'y Gen.*, 463 F.3d 1247, 1250-51 (11th Cir. 2006) (court lacks jurisdiction to consider a claim not properly raised before the BIA even if the BIA decides the merits of the claim *sua sponte*); *Sidabutar v. Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007) (court has jurisdiction to consider a claim not properly raised before the BIA if the "BIA issues a full explanatory opinion" addressing the issue but not "where the BIA summarily affirms [an immigration judge's] decision"); *Abebe v. Gonzales*,

432 F.3d 1037, 1040-41 (9th Cir. 2005) (en banc) (court has jurisdiction to consider a claim not properly raised before the BIA, *inter alia*, if the BIA summarily affirms an immigration judge's decision addressing the issue).

The courts of appeals have also reached differing conclusions on the related question of whether issue exhaustion under Section 1252(d)(1) is a jurisdictional requirement. *See Lin v. Att'y Gen.*, 543 F.3d 114, 120 n.6 (3rd Cir. 2008) (discussing this conflict and observing that "a number of our sister courts of appeals have struggled with" this question). Since resolution of these questions involves "unsettled questions of immigration law" (*Zine v. Mukasey*, 517 F.3d 535, 539 (8th Cir. 2008)), this case is not an appropriate vehicle to consider them.

4. Moreover, the employment discrimination and immigration cases cited by BNSF involve cases where a claimant is seeking relief from a federal agency and the forfeiture issues, generally speaking, are whether the claimant has followed governing claim processing rules and if it has not, whether the agency has forfeited that defense by deciding the claimant's request for relief on the merits, a forfeiture that adversely impacts the agency, not the claimant. In the instant case, there is no issue concerning whether WFA followed the governing procedural rules – it clearly did – and WFA also asked the Board to find that BNSF had waived its belatedly raised Section 11701(c) objections. If the STB is found to have forfeited the right to argue that BNSF's Section 11701(c) contentions are forfeit because the STB rejected these contentions on the

merits without also finding they were not properly raised, WFA unfairly loses the forfeiture defense due to the agency's failure to address WFA's timely raised objection that BNSF waived its Section 11701(c) contentions by not presenting them in a fair or timely manner to the Board.

5. BNSF argues the court of appeals erred by impermissibly "affirm[ing]" the STB's decision on grounds not relied upon by the Board and by not "defer[ing] to [the STB's] waiver of its own rules of procedure." Pet.2, citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) ("*Chenery*") and *Weinberger v. Salfi*, 422 U.S. 479 (1975). BNSF's argument rests on faulty premises. The court of appeals did not affirm the merits of the Board's ruling rejecting BNSF's automatic dismissal contentions; it found instead that BNSF had forfeited its right to judicial review of the merits of that issue. *See ICC v. Bd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) ("*Chenery* has nothing whatever to do with *whether agency action is reviewable*"). Also, there is no evidence in the administrative record that the STB intended to waive its procedural rules, nor, of course, can the STB waive procedural rules, like its SAC case rules, that are intended "to confer important procedural benefits" on coal shippers. *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970).

Assuming *arguendo* that the court of appeals did "affirm" the Board's rejection of BNSF's automatic dismissal contentions, this result is perfectly permissible under *Chenery* on the facts of this case. The STB argued forcefully in the court of

appeals that BNSF had forfeited these contentions by failing to raise them in a fair and timely manner before the Board and it is clear that the STB would have reached the same conclusion on remand. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n.6 (1969) (plurality opinion) ("*Chenery* does not require that [courts] convert judicial review of agency action into a ping-pong game" by requiring remand where it "would be an idle and useless formality").

III. THIS CASE DOES NOT INVOLVE FREQUENLTY RECCURING ISSUES OF NATIONAL IMPORTANCE

This case does not raise any recurring issues of national importance meriting review by this Court.

1. BNSF argues that the forfeiture-of-forfeiture issue it raises occurs frequently in the federal courts. Pet.24. In fact, this issue has arisen only twice in cases involving review of STB orders – this case and *Otter Tail* – and in each case the appellate court held that the STB did not forfeit its forfeiture contentions by deciding the merits of the forfeited issue. Moreover, as discussed above, this case is not the proper vehicle to address forfeiture-of-forfeiture issues involving other agencies, other statutory schemes, and different facts.

2. Similarly, the Section 11701(c) automatic dismissal contentions BNSF raises are not ones that frequently occur. The STB, and the ICC before it, have consistently, and correctly, construed Section

11701(c), and its statutory predecessors, as not applying in rate cases initiated by shippers. *See AEP Texas*, 2006 WL 3290425 at *2-*4 (JA261-65); *1983 Interpretation*, 367 I.C.C. at 407-12. This construction of Section 11701(c) complies with the text and legislative history of Section 11701(c) and, as both agencies emphasized, a contrary reading would violate a complainant shipper's due process rights in cases where, as here, the agency failed to finally decide the case in three years through no fault of the shipper. *Id.*[5]

Since the STB was created in 1996, only BNSF has argued that Section 11701(c) applies in rate complaint cases and BNSF has advanced this claim only in three coal rate cases: *Xcel*, *AEP Texas*, and *WFA*. In each of these cases, BNSF attempted to spring the defense either long after, or just before, the asserted dismissal date, in transparent and unsuccessful efforts to strip the complainant shippers of their most basic due process right in a rate case – a fair hearing and final decision on their complaints. The only recurring issue here is BNSF's attempt to misuse Section 11701(c) as a last gasp sandbag defense to strip shippers of their due process rights.

3. Finally, BNSF asserts this case is worthy of review by this Court because the Board awarded WFA "the largest reparations order ever entered by the STB." Pet.1. However, the size of the Board's

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[5] The court of appeals' decision sets forth a detailed summary of the STB's reasonable construction of Section 11701(c), as well as BNSF's impermissible construction. Pet.App.11a-14a.

award is not surprising given BNSF's attempt to unilaterally implement one of the largest rate increases ever imposed on a rail shipper, and the fact that WFA had to pay BNSF's increased rates for several years while the case was being litigated before the Board. Moreover, in its rate relief orders, the Board permitted BNSF to raise its rates substantially on WFA's traffic to highly remunerative levels, but not to the full monopoly levels BNSF sought to impose. BNSF may not be happy with this result, but the Board's resolution of WFA's complaint, and the court of appeals review of that resolution, does not raise any recurring issues of national importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA; BASIN ELECTRIC POWER COOPERATIVE, INC.; AND WESTERN FUELS ASSOCIATION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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QUESTIONS PRESENTED

Under 49 U.S.C. §11701(c), an investigative proceeding "is dismissed automatically unless it is concluded by the [Surface Transportation] Board" within three years. In this case, shippers challenged BNSF's coal-transport rates. The Board initially found—prior to expiration of §11701(c)'s three-year deadline—that the shippers had failed to prove BNSF's rates unreasonable. But the Board gave the shippers a second chance to make their case. Over BNSF's objection that the continued proceedings had impermissibly extended beyond §11701(c)'s three-year deadline, the Board considered the shippers' new case, found the challenged rates unreasonable, and ordered more than $300 million in rate relief—by far the largest award ever entered by the STB. On appeal, BNSF argued (inter alia) that the Board's later order was contrary to law under §11701(c). The D.C. Circuit refused to address that substantial challenge, even though it had been raised timely under the Board's own rules and the Board had rejected the argument on the merits. The questions presented are:

1. Whether the D.C. Circuit erred by holding that petitioner's argument challenging agency action was forfeited before the agency, when the agency had resolved the argument on its merits without ever suggesting that the argument had not been properly raised. The D.C. Circuit has joined the Fifth and Eighth Circuits by finding an administrative forfeiture in these circumstances, in square conflict with decisions of the Third, Seventh, Ninth, Tenth, and Federal Circuits.

2. Whether the D.C. Circuit erred in imposing, ex post, its own judicially-created rule of administrative forfeiture not grounded in any statute, rule, or agency practice, in conflict with this Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

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ARGUMENT

I.A. The government is not willing to directly endorse the D.C. Circuit's arrogation of the Board's discretionary authority over the timing of agency pleadings. It instead attempts to justify the court of appeals' forfeiture holding on an alternative rationale: that *Chenery* does not apply where "the ultimate result" (if the court were to remand) "is clear." U.S.Opp.8, 10. But it does not argue, and the D.C. Circuit did not purport to hold, that the Board was *required* to find that BNSF forfeited its §11701(c) objection. *Chenery* applies with full force where, as here, the standards for procedural compliance are (indisputably) a matter entrusted to the agency's discretion.[1]

This Court has applied *Chenery* for more than six decades, reaffirming time and again that courts "may not affirm on a basis containing *any element of discretion* ... that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (emphasis added); *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 651-52 (1990) ("[I]f an agency's decision is to be sustained in the courts on any rationale [involving] deference, it must be upheld on the rationale set forth by the agency itself."). By its terms, *Chenery* does not require a remand where the ultimate outcome of proceedings is *compelled* by statute or Supreme Court

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[1] The Board did not advance this alternative defense of the opinion in its response to BNSF's petition for rehearing. The Acting Solicitor General now advances it for the first time, after obtaining three extensions of time to respond to the petition.

precedent, such that the agency lacked discretion to reach a different result. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544-45 (2008) (upholding FERC order on basis raised by agency for the first time on appeal because result was *compelled* by law). But contrary to the government's suggestion, there is no "exception" to *Chenery* that allows a court to affirm on alternative discretionary grounds.

This case presents a paradigmatic *Chenery* scenario: the court of appeals imposed its own equitable judgment, deciding in the first instance the *discretionary* issue of whether BNSF's argument was presented timely under agency practice. Respondents do not contend that the Board was compelled to find a forfeiture. They do not claim that the STB lacked discretion to reach the merits of BNSF's §11701(c) argument. Rather, they suggest that the Board "*would*" exercise its discretion to find a forfeiture (even though it actually did not).[2] That is precisely the

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[2] The government suggests that "WFA might well claim" that a failure to find forfeiture here would be "arbitrary and capricious" in light of the Board's decision in *AEP Texas North Co. v. BNSF Railway Co.*, STB Docket No. 41191 (Nov. 9, 2006). U.S.Opp.9. Beyond having nothing to do with the D.C. Circuit's opinion, which did not cite *AEP Texas*—this argument is both factually and legally baseless. As explained below (at 8-9), the circumstances that drove the Board's forfeiture holding in *AEP Texas* are completely absent here. Moreover, even if the cases were on all fours, an agency may, in its discretion, decline to enforce a forfeiture (Pet.13) or depart from its prior precedents. *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009). Respondents do not argue that the Board lacked such discretion. What the Acting Solicitor General believes the agency *might* decide if forced to address the forfeiture argument anew is

sort of judicial conjecture *Chenery* forbids. The agency's "action must be measured by what [it] did, not by what it might have done." *SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943). Sanctioning an exception to *Chenery* in these circumstances would obliterate the rule.[3]

The D.C. Circuit did not purport to apply any exception to *Chenery*. And because no such argument appeared in the responses to BNSF's petition for rehearing, there is nothing to suggest that either the panel or the other members of the D.C. Circuit understand the opinion in that way. *Contra* U.S.Opp.13-14. The D.C. Circuit exercised its own equitable judgment in holding that BNSF did not timely present the three-year dismissal argument to the Board, in direct conflict with *Chenery* and the decisions of other circuits.

B. Respondents concede that the courts of appeals are divided on whether a federal court may find administrative forfeiture in the first instance. They offer no persuasive reason why this case is not a suitable vehicle for resolution of the conflict.[4]

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irrelevant to the question presented, which is whether the *court of appeals* may make that decision in the first instance.

[3] *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality), cited in passing by the government (U.S.Opp.8), does not establish such an exception. In *Wyman-Gordon*, the plurality merely rejected a dissenter's suggestion that *Chenery* required a remand where the adjudicative order under review referred to an invalid rule but was itself indisputably a proper and reasoned exercise of the Board's authority. 394 U.S. at 763-67 & n.6.

[4] WFA suggests that the petition seeks mere error correction, because the D.C. Circuit's opinion cites *Chenery* (and *Tucker Truck*). But this Court routinely grants certiorari in

The government insists that "[m]ost" of the conflicting cases are distinguishable because they involve situations where "the agency was an interested party that failed to raise [a forfeiture] argument in its own defense." U.S.Opp.11-12. But *Chenery* has always applied equally regardless of whether the agency is an "interested" party or is instead functioning as an adjudicating body. *E.g.*, *Gonzales v. Thomas*, 547 U.S. 183 (2006). Indeed, the government acknowledges that its "disinterested-adjudicator" formulation does not dispose of the cases arising from BIA decisions—in which the courts have overwhelmingly refused to find forfeiture when the BIA has addressed the merits of a claim. The government suggests that those cases are not "comparable" to this case because they do not involve *private* interested litigants on both sides. U.S.Opp.13. But that creative distinction also finds no support in this Court's *Chenery* jurisprudence. *See, e.g.*, *Morgan Stanley*, 554 U.S. at 544 (*Chenery* applies to FERC order concerning contract dispute among private parties). Moreover, the Acting Solicitor General offers no reason why the government-as-litigant should be treated worse for these purposes than a private interested party (nor, we expect, would he adhere to that view if pressed).[5]

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circumstances where there was only "perfunctory recognition" of the correct standard. *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2757 (2010). Certiorari is similarly warranted here, because it is plain that the cited precedents have proved too-faint guideposts for several courts of appeals.

[5] WFA identifies an entirely different conflict that is specific to the immigration context—whether the INA, 8 U.S.C. §1252(d)(1), *precludes* federal-court review of issues that have not been exhausted before the agency. WFA.Opp.28-29. That conflict

C. Certiorari is warranted because the influential D.C. Circuit is on the wrong side of a mature circuit conflict about the power of a federal court to affirm agency action based on a supposed administrative forfeiture not found by the agency. This conflict implicates fundamental principles of administrative law that define the relationship between courts and agencies. The circuit split is no less important because the issue arises in a wide variety of contexts, including cases involving the BIA, VA, STB, and Treasury. *Contra* WFA.Opp.27. To the contrary, that demonstrates that the question presented is important and likely to recur frequently. *See, e.g., Chaney v. Heckler*, 724 F.2d 1030, 1030-31 (D.C. Cir. 1984) (Scalia, J., dissenting from denial of reh'g) (noting the administrative law issue to be "of sufficient significance and of sufficiently general application to warrant the attention of the full court," citing SEC, EEOC, and FHA cases, among others), *underlying judgment rev'd, Heckler v. Chaney*, 470 U.S. 821 (1985).[6]

The government ultimately acknowledges that the D.C. Circuit's opinion may be indefensible on its own terms, and suggests that this Court might redress the error with a GVR (for further consideration of

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obviously is not presented here, and BNSF does not ask this Court to resolve it.

[6] In an attempt to cabin the decision below as a mere aberration, the government dismisses *JJ Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041 (D.C. Cir. 2009), as "different" and "not cited below." U.S.Opp.13 n.3. The government sang a very different tune when it relied on *JJ Cassone* on rehearing to assure the court of appeals that the panel's decision was consistent with circuit precedent holding that administrative forfeiture issues are not "entrusted solely" to the agency. U.S.Reh'g Resp.10.

Chenery, presumably). U.S.Opp.15. *But see Webster v. Cooper*, 130 S.Ct. 456 (2009) (Scalia, J., dissenting). The D.C. Circuit was well aware of *Chenery*, but (like the Fifth and Eighth Circuits) apparently views *Chenery*'s mandate as merely precatory. We therefore believe the more appropriate disposition would be a grant for plenary review or summary reversal instructing the D.C. Circuit to decide the merits of BNSF's statutory challenge to the Board's orders.[7]

II.A. The D.C. Circuit's assertion of authority to declare an administrative forfeiture based on nothing more than its own assessment of the equities also warrants certiorari because it fundamentally misapprehends the limited role of a reviewing court. Under *Vermont Yankee*, a federal court is not free to "impose upon the agency its own notion of which procedures are 'best.'" 435 U.S. 519, 549 (1978).

Respondents argue that *Vermont Yankee* is not controlling, because the court of appeals affirmed, rather than invalidated, the Board's decision. U.S.Opp.11; WFA.Opp.23.[8] They are mistaken.

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[7] The Court should also decline the government's suggestion (U.S.Opp.10 n.2) to invite the D.C. Circuit to remand the forfeiture issue to the Board. If WFA believed the Board to be compelled to find a forfeiture, it should have argued forfeiture as an alternative basis for affirmance in its brief in the court of appeals. WFA chose not to do that, and it is in no sense "unfair[]" (WFA.Opp.30) to restrict it now to the arguments it made on appeal. Moreover, an agency that has addressed the merits should not have a second opportunity—with the benefit of having gauged a panel's reaction to its merits decision—to reconsider whether to exercise its equitable discretion to declare a forfeiture. *See* Pet.16-20.

[8] Nor does Board counsel's decision to ride the forfeiture bandwagon at oral argument save the court of appeals' ruling. *See*

Vermont Yankee stands for the general proposition that "the [APA] sets forth *the full extent of judicial authority* to review executive agency action for procedural correctness." *Fox*, 129 S.Ct. at 1810 (citing *Vt. Yankee*, 435 U.S. at 545-549). That fundamental principle of administrative law has never been limited to situations where the court is invalidating agency action.

The government also contends that the D.C. Circuit did not violate *Vermont Yankee* because the court merely enforced the Board's own forfeiture precedent, which the Board *would* have applied had it focused on the issue. But it is perfectly clear that the D.C. Circuit did not purport to enforce any Board precedent (Pet.App.16a-17a), and equally clear that under the Board's rules and practice BNSF's argument was timely raised.

1. Respondents rely principally on the Board's decision in *AEP Texas*, insisting it is factually "identical" to and "precisely the same" as this case (U.S.Opp.5, 9), and arguing that it demonstrates that the D.C. Circuit's forfeiture holding was (unwittingly) consistent with Board practice. Respondents understandably did not cite *AEP Texas* when they were pressed at oral argument to explain why BNSF's §11701(c) argument should be declared forfeit, and the D.C. Circuit rightly did not rely on it, because the facts that led the Board to find a forfeiture in *AEP Texas* are absent here.

In *AEP Texas*, the Board held that the railroad "waived" its §11701(c) argument "through its course of

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Morgan Stanley, 554 U.S. at 568; *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974).

conduct." JA-265. The Board found that the railroad had agreed to a procedural schedule (prior to expiration of the three-year period) that would extend proceedings beyond the three-year deadline, represented that the extended schedule would not prejudice AEP, and then moved to dismiss AEP's complaint in the midst of that agreed-upon schedule before the Board could render *any* decision on its case. In those circumstances, the Board found that the railroad could not argue for dismissal under §11701(c), because it had "induced" or "tricked" the complainants "into allowing [the] deadline to pass." JA-265 (citations omitted).

This case is different in all critical respects. Here BNSF cannot be accused of having lulled the complainants or the Board into adopting a schedule that transgressed the three-year deadline. The original proceedings culminated in the 2007 Order, within three years. Later, after WFA had elected to continue the proceedings and the three-year period had already expired, BNSF agreed to a procedural schedule for those renewed proceedings. *See* Add.1a-5a (Oct. 22, 2007 Notice proposing procedural schedule).[9]

And, contrary to the Board's finding in *AEP Texas*, BNSF never represented that WFA would not be prejudiced by the Board's decision to hold proceedings in abeyance pending *Major Issues*. *Contra* U.S.Opp.4, 9-10. BNSF's filing in *Major Issues* (reproduced

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[9] BNSF consistently argued that if proceedings continued beyond October 19, 2007, the continued proceedings would have to be treated as a new case and any rate relief would therefore have to be prospective. *See, e.g.*, Pet.App.34a-35a.

herein, Add.6a-9a) simply acknowledged the utilities' prejudice argument and countered that they were ignoring the many offsetting *benefits* of the rulemaking. Add.8a. Indeed, at oral argument, the Board explicitly disclaimed any "suggest[ion] that [BNSF] caused the Board to hold this case in abeyance." Add.13a.

Even with the delay resulting from *Major Issues*, the Board rendered a decision on WFA's initial case with about a month to spare on the three-year deadline, having considered WFA's supplemental evidence, which was designed to conform with the new *Major Issues* rules. Enforcement of the three-year deadline, therefore, would not have deprived WFA of due process (*contra* WFA.Opp.10, 15, 32); it simply would have prevented the Board from giving WFA a do-over that even the Board believed was a gratuitous gesture. Pet.App.26a.[10]

2. Respondents also suggest that the Board's 2007 Order required BNSF to raise its §11701(c) argument in a petition for reconsideration of that

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[10] For that reason, WFA's reliance on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), is entirely misplaced. And the Board never found (*contra* WFA.Opp.11) that due process required that WFA have a second opportunity to prove its case. *See* Pet.App.26a; Pet.App.36a; JA-615. To the contrary, the Board explained in *Major Issues* that applying the new rules to this case did not upset WFA's "settled expectations." JA-251. The Board gave WFA ample "notice and an opportunity to offer evidence bearing on the new standard" when it informed WFA in *February 2006* that the new rules would apply to its case. *BNSF Railway Co. v. STB* ("*Major Issues*"), 526 F.3d 770, 784 (D.C. Cir. 2008). And, until it learned in September 2007 that it had lost, WFA never asked for an opportunity to redesign its case, much less argue that due process so required.

order. U.S.Opp.10; WFA.Opp.18. Beyond (once again) having nothing to do with the D.C. Circuit's actual holding, this suggestion is also meritless. The 2007 Order stated that "[p]arties should use the 20-day reconsideration period to identify technical or substantive errors ... *based on the record developed to date*," Pet.App.31a n.28, because the parties would not be permitted to use the continued proceedings to "relitigate" issues that had been decided and were not affected by *Major Issues*. Pet.App.31a. Of course, the §11701(c) issue had not been litigated or decided by the Board at that point, since the Board was on track to render a final decision in the case within three years. Indeed, the Board further specified that the 2007 Order would be treated as final and proceedings "discontinue[d]" unless WFA elected within 30 days to continue proceedings and supplement its case. Pet.App.31a. As noted above, WFA did not elect to extend proceedings until October 22, *after* the three-year deadline and the reconsideration period had passed. Add.1a-5a. WFA's decision (in late October 2007) to submit a revised case was therefore not an error "based on the record developed" as of September 2007. Pet.App.31a n.28.

B. The government urges this Court not to worry about the D.C. Circuit's arrogation of agency authority because the "circumstances of this case ... are relatively unique" (U.S.Opp.13), and the Board can still "formulate and apply its own timeliness rules in future cases" (U.S.Opp.11). That assurance is cold comfort, since the D.C. Circuit may apparently decide in any particular case to exercise its own equitable judgment—with no prior warning to litigants in the administrative process as to whether they are

presenting their arguments to the agency with sufficient haste.

III. The D.C. Circuit's decision warrants this Court's review because, in conflict with *Chenery* and *Vermont Yankee*, it upsets the fundamental balance of powers between agencies and federal courts, and exacerbates a significant and mature circuit split. This case is a suitable vehicle because there are no threshold issues that could thwart this Court's resolution of the important administrative law questions presented.

Respondents nevertheless suggest that this Court should take a pass because, regardless of whether its argument was improperly defaulted, BNSF will eventually lose on the merits. To the extent the merits of the underlying statutory issue (not before the Court) are relevant, they weigh in favor of granting certiorari. The statute is not susceptible to the Board's interpretation, for reasons explained in the petition (Pet.7-8) and at length in BNSF's briefing in the D.C. Circuit. Indeed, at least two members of the panel—Judges Garland and Henderson—were openly skeptical of the Board's counter-textual interpretation. Add.10a-13a. BNSF should not have been denied review of its challenge to the Board's $300 million reparations order because a panel of the D.C. Circuit felt, subjectively, that BNSF waited too long to assert its rights.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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ADDENDUM

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BEFORE THE
SURFACE TRANSPORTATION BOARD

WESTERN FUELS ASSOCIATION, INC. and BASIN ELECTRIC POWER COOPERATIVE, INC.	)	
Complainants	)	Docket No. 42088
v.	)	
BNSF RAILWAY COMPANY	)	
Defendant.	)	

SUPPLEMENTAL EVIDENCE NOTICE

Pursuant to the Board's decisions served in this proceeding on September 10, 2007 and September 26, 2007, Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively "WFA/Basin") hereby notify the Board that they wish to submit supplemental stand-alone cost ("SAC") evidence.[1] WFA/Basin request that the Board adopt the proposed procedural schedule set

[1] Nothing in this Notice should be construed as a waiver of WFA/Basin's objections to the Board's actions in this case. These objections remain ongoing.

forth in Attachment 1 to govern the submission of supplemental SAC evidence.

WFA/Basin's proposed procedural schedule does not permit any supplemental discovery. WFA/Basin are amenable to this approach provided that the Board directs that the parties' supplemental evidence be limited to the use of material already in the administrative record (including the discovery record) as well as any other public or commercial material that is equally available to each side without discovery against the other.

As the Board knows, SAC changes of the type permitted under the Board's September 10, 2007 decision will be complex, time-consuming and very expensive for WFA/Basin. Additional discovery will greatly add to this complexity, delay and expense. However, as the Board also knows, most data needed to present a SAC case is confidential or highly confidential data possessed by the defendant earner, here BNSF Railway Company ("BNSF"). WFA/Basin must not be prejudiced by BNSF"s selective presentation in BNSF"s supplemental evidentiary filings of new confidential or highly confidential internal BNSF data. WFA/Basin address this concern by their proposed evidentiary limitation. If the Board does not grant WFA/Basin's requested limitation, WFA/Basin request that the Board adopt the procedural schedule set forth in Attachment 2.

Respectfully submitted,

WESTERN FUELS ASSOCIATION, INC and BASIN ELECTRIC POWER COOPERATIVE, INC

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Dated:
October 22, 2007

Attachment 1

PROPOSED PROCEDURAL SCHEDULE

Date	Event
Day 0	Date of service of STB decision *adopting procedural schedule*
Day 60[1]	WFA/Basin's opening third supplemental SAC evidence due
Day 105	BNSF's reply third supplemental SAC evidence due
Day 135	WFA/Basin's rebuttal third supplemental SAC evidence due
Day 210	STB final decision due

[1] If Day 60 falls between December 24, 2007 and January 1, 2008, this due date shall be extended to January 7, 2008, with all subsequent dates adjusted accordingly.

Attachment 2

PROPOSED PROCEDURAL SCHEDULE

Date	Event
Day 0	Date of service of STB decision adopting procedural schedule; Discovery period begins[1]
Day 45	Discovery period ends
Day 105	WFA/Basin's opening third supplemental SAC evidence due
Day 150	BNSF's reply third supplemental SAC evidence due
Day 180	WFA/Basin's rebuttal third supplemental SAC evidence due
Day 255	STB final decision due

[1] Initial discovery responses and objections will be due 5 business days after service of the requests. Any motions to compel will be due 5 business days thereafter. These motions will be handled under the Board's discovery procedures set forth at 49 CFR 1114.31(a), except that a reply to a motion to compel will be due 5 business days after receipt of the motion.

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 657 (Sub-No.1)

MAJOR ISSUES IN RAIL RATE CASES

BNSF RAILWAY COMPANY'S
REPLY TO PETITION FOR RECONSIDERATION

BNSF Railway Company ("BNSF") hereby replies to the Joint Petition for Reconsideration of Western Fuels Association, Inc. ("WF A"), Basin Electric Power Cooperative, Inc. ("Basin"), Kansas City Power & Light Company ("KCPL") and Western Coal Traffic League ("WCTL"), filed on March 20, 2006 in the above-captioned proceeding.

As discussed more fully below, BNSF supports the Board's efforts to address important issues of SAC methodology through a rulemaking proceeding. While BNSF is not in favor of all of the changes proposed by the Board, BNSF nevertheless urges the Board to follow through with the proposed rulemaking so that its future application of SAC methodology may better conform with the statutory objectives and economic principles underlying the *Coal Rate Guidelines*.

ARGUMENT

I. RULEMAKING IS A FAIRER AND MORE EFFICIENT MEANS OF ADDRESSING RECURRING ISSUES OF SAC METHODOLOGY THAN CASE-BY-CASE ADJUDICATION

Petitioners request that the Board terminate the rulemaking proceeding and continue to develop rules governing the application of the SAC test on a case-by-case basis. They claim that the decision to convene a rulemaking proceeding on SAC issues is contrary to the wishes expressed by shippers participating in the April 2005 hearing in Ex Parte No. 657, *Rail Rate Challenges Under the Stand-Alone Cost Methodology*. They assert that SAC issues should be addressed only in the context of individual cases. Petition at 2-3. They further claim that the decision to convene a rulemaking proceeding "prejudices the interests of parties such as WFA/Basin and AEP Texas North Company" that have already presented evidence and argument on their rate reasonableness claims. *Id.* at 4.[1] They complain about the burden of submitting new evidence and argument in cases where significant expenditures of time and effort have already been made and they complain about the delay that will result from a stay of the cases while the rulemaking proceeding is pending. *Id.* at 6-7.

None of petitioners' complaints constitutes an assertion of material error that would justify a reversal

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[1] Although Petitioners refer to the pending rate case in which AEP Texas is a complainant, AEP Texas is not a party to the petition, nor is it a member of Petitioner Western Coal Traffic League.

of the Board's decision to institute a rulemaking proceeding to address major issues of SAC methodology. The decision to open a rulemaking proceeding on the subject of SAC methodology is within the Board's sound discretion. It is entirely rational for the Board to conclude that recurring issues of SAC methodology that potentially affect multiple current and future litigants are best addressed through a rulemaking proceeding than through case-by-case adjudication. As BNSF noted in the testimony it submitted in the April 2005 Ex Parte No. 657 hearing, the *Coal Rate Guidelines* have been in place for 20 years and they have not been revisited since they were adopted. The *Guidelines* are based on sophisticated economic principles. Experience has shown that the application of those principles exclusively through case-by-case litigation has produced standards that diverge from those underlying principles. The *Guidelines* themselves recognized "that the workability of the *Guidelines* is most appropriately evaluated in light of experience." *Guidelines* at 525. The Board has appropriately determined that the time has arrived to carry out that evaluation.

While Petitioners claim prejudice in that individual litigants will experience some delay in the resolution of their cases, they ignore the potential benefits of rulemaking for a broader class of actual and potential litigants. Rulemaking can yield greater clarity regarding the application of SAC standards going forward than case-by-case litigation and thereby foster private resolution of disputes. It is also a fairer way of formulating rules than case-by-case litigation because it allows participation by all potentially affected parties.

It is particularly appropriate that there be a focused assessment of the application of maximum rate standards for coal transportation given the current state of coal transportation markets. Demand for coal transportation is at an all-time high and is projected to increase dramatically. At the same time, rail capacity is constrained and new investments are needed to expand capacity and improve service for the entire community of shippers served by the nation's freight railroads. The Board's application of its rate reasonableness standards should be considered against these new realities of the market. The proposed rulemaking will give all persons potentially affected by the Board's rate reasonableness standards an opportunity to present their views on how the Board's application of these standards will affect the critical real world issues of infrastructure needs and service quality.

For the foregoing reasons, BNSF urges the Board to deny the Petition for Reconsideration and to conduct the rulemaking proceeding that it initiated with its February 27, 2006 order.

Respectfully submitted,

/s/ Samuel M. Sipe, Jr.

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April 10, 2006

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BNSF Railway Company, Petitioner, v. Surface Transportation Board, et al., Respondents.	No. 09-1092, et al.

Thursday, February 18, 2010

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

* * *

[MR. LIGHT]

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[37]

* * *

Turning to the construction of 10701 -- 11701, the basic question is did Congress intend to require the automatic dismissal of complaint-based proceedings that are not resolved in three years, and the answer is no. First, the statutory language does not compel that result. The term formal investigative proceeding by itself is not clear and [38] unambiguous, it's not defined

in the statute, and it's not used elsewhere in the statute. And the reference to subsection A doesn't clear things up. Through th [sic] exception clause, subsection A clearly encompasses both agency-initiated investigations and complaint-based investigations. Moreover, subsection A specifically recognizes that both types of these investigations are authorized under other specific provisions of the Act.

I think one way of looking at this, Your Honors, is that subsection A would mean the same thing if it said except as authorized by Section 10745, Section 11323, et cetera, et cetera, et cetera, the Board may begin an investigation only on complaint. And in that case I think it would be clear that subsection A encompasses both agency-initiated and board-initiated investigations.

JUDGE GARLAND: But what would make it that only the board-initiated is formal?

MR. LIGHT: Well, Your Honor, I'm not suggesting that it is clear and unambiguous that that is the only interpretation of subsection A. What I'm suggesting is subsection A is ambiguous, and therefore the Board is entitled --

JUDGE GARLAND: What makes it ambiguous that there's a difference between those two? If A said the Board can initiate investigations either on its own or on complaint, and **[39]** part C says formal investigation authorized under this section has to be done in three years, what's ambiguous about the fact that both of those have to be done in three years? Unless there's something that makes one formal and the other not.

MR. LIGHT: Because the term formal investigative proceedings is ambiguous. It could be referring to --

JUDGE GARLAND: Could be ambiguous, but what makes it apply to one rather than -- what makes it ambiguous in the sense that it only applies to a Board-initiated rather than complaints?

MR. LIGHT: Well, there's --

JUDGE GARLAND: Is there anything more formal about a Board-initiated proceeding than a complaint-initiated proceeding?

MR. LIGHT: I don't know about that, Your Honor. But I think the basic point is that it could refer to either of them, and since we don't know which one it does refer to, the agency is entitled to construe the ambiguity.

JUDGE GARLAND: Well, it suggests that it doesn't apply to both of those.

JUDGE HENDERSON: Yes.

JUDGE GARLAND: Why is it unclear that it doesn't apply to both of them under the circumstances you're talking about?

MR. LIGHT: Because since we don't know what it does [40] apply to it could apply to either. And, I mean, I agree, it could apply to both, but it could apply to either, and since it could apply to either one or the other, the agency is entitled to interpret it in a way to avoid serious constitutional difficulties.

JUDGE GARLAND: Are the words formal investigative proceeding referred to anywhere else?

MR. LIGHT: No.

JUDGE ROGERS: How about in the regulations? Is it defined anywhere?

MR. LIGHT: I don't believe so, Your Honor.

JUDGE ROGERS: Yes.

MR. LIGHT: And because the --

JUDGE HENDERSON: Let me ask you so I'm clear, so you're saying that it can refer to either, including one brought by the Commission on its own initiative, even after '95 when that language is omitted is because of the savings language in subsection A?

MR. LIGHT: If I understand your question yes, it could have been interpreted as applying to either or both, but the Board interpreted it as applying to agency --

JUDGE HENDERSON: Okay, that's before '95. Then in '95 the initiative, your own initiative language is excised, so now -- I just want to find out if I'm understanding your position -- now you say that doesn't make any difference even [41] though they excised that because of the savings provision at the beginning of A?

MR. LIGHT: The except as otherwise provided, correct.

* * *

[43]

* * *

MR. LIGHT: And we're not suggesting that BN caused the Board to hold this case in abeyance, but what I'm suggesting is that there are situations where, you know, a railroad would have, under BN's interpretation would have the incentive to try and do that.

* * *